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The Federal Constitutional Right to Trial by Jury of the Offense of Driving While Intoxicated

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Drunk driving causes at least one-half of all highway deaths and accidents in the United States.[1] Although the number of persons arrested is extremely low in relation to the number of drunk drivers on the road,[2] more people in the United States are charged with the crime of driving while intoxicated (DWI)[3] than with any other crime.[4] The very large number of intoxicated drivers poses a constant safety threat to highway users,[5] and results in enormous economic losses.[6] In response to the drunk driving problem, most states have en-

1. *See* Daly & Kassekert, *Can the Courts Cope with Alcoholism?*, 8 UPDATE ON LAW-RELATED EDUC., Winter 1984, at 42, 44 (according to pathologists' organization, drunk drivers are involved in 90% of fatal accidents); Quade, *The Drunk Driver: Where do we go from here?*, 69 A.B.A. J. 1201, 1202 (1983) (stating "alcohol is involved in 55% of all fatal highway crashes and is responsible for up to 27,500 deaths and 700,000 injuries a year").

2. *See* Comment, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1677 (1981) (noting drunk driver has one in 2000 chance of apprehension); *see also* R. HAGEN, E. MCCONNELL & R. WILLIAMS, SUSPENSION & REVOCATION EFFECTS ON THE DWI OFFENDER 13 (1980) (stating each drunk driver commits between 200 and 2000 DWIs before identification).

3. Some jurisdictions classify the offense as driving under the influence of alcohol and thus use the abbreviation DUI. *See, e.g.*, KAN. STAT. ANN. § 8-1567 (Supp. 1987); *see generally* 3 R. ANDERSON, WHARTON'S CRIMINAL LAW & PROCEDURE §§ 990-98 (1957 & Supp. 1979) (discussing history and elements of DWI).

4. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1984 UNIFORM CRIME REPORTS FOR THE UNITED STATES 163 (1985) [hereinafter CRIME REPORTS]. In 1984, there were almost 1.8 million DWI arrests. *Id.* Assuming a drunk driver has only a one in 2000 chance of arrest, *see supra* note 2, nearly 3.6 billion instances of DWI may occur each year—an average of almost 15 instances of drunk driving per year for every citizen of the United States. *Cf.* Rubenstein, *Tough Laws Mean High Fees for DWI Lawyers*, 1 Minn. L.J., Feb. 27, 1987, at 1, 11 (stating 25% of all Minnesota arrests are for DWI).

5. *See* Comment, *supra* note 2, at 1674 (stating blood alcohol level of .15% increases chance of involvement in fatal accident 25 times); *see also* Starr, *The War Against Drunk Drivers*, NEWSWEEK, Sept. 13, 1982, at 34 (citing national statistics that 10% of all drivers are legally intoxicated on weekend nights).

6. *See* PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 1 (1983) [hereinafter REPORT] (stating annual cost of drunk driving exceeds $20 billion).

acted more stringent penalties for DWI[7] and have increased enforcement of these laws.[8] In addition, many citizens' organizations publicize and attempt to combat this problem.[9]

As the penalties for, and recognition[10] of, the DWI problem increase, courts often face the issue of whether the United States Constitution guarantees the right to a jury trial for DWI defendants.[11] Federal courts are divided over the issue of whether DWI is a petty[12] or serious[13] offense and thus whether

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7. In 1982, at least 27 states strengthened their DWI penalties. *See* Starr, *supra* note 5, at 35. In 1983, 40 states passed tougher drunk driving laws. Daly & Kassekert, *supra* note 1, at 44. *See also* REPORT, *supra* note 6, at 2 (noting that in one year 41 states established task forces to study DWI).

8. *See* CRIME REPORTS, *supra* note 4, at 166 (indicating that DWI arrests increased 52% from 1975 to 1984).

9. The largest of these groups is Mothers Against Drunk Driving (MADD), which has approximately 600,000 members. *See* 1 ENCYCLOPEDIA OF ASSOCIATIONS 1080 (22d ed. 1988). Other similar groups include Citizens for Safe Drivers Against Drunk Drivers/Chronic Offenders, National Commission Against Drunk Drivers (NCADD), React International: CB Radio Coalition Against Drunk Drivers, Remove Intoxicated Drivers (RID), Students Against Drunk Drivers (SADD), and Truckers Against Drunk Drivers (TADD). *Id.* at 1079, 1081-83; *see also infra* note 173 and accompanying text (describing activities of citizens' organizations).

10. *See* Quade, *War on Drunk Driving: 25,000 Lives at Stake*, 68 A.B.A. J. 1551, 1551 (1982) (politicians, judges, and citizens believe drunk driving "has been a national epidemic and a disgrace long enough"); *see also* South Dakota v. Neville, 459 U.S. 553, 558 (1983) (lamenting well-documented carnage caused by drunk drivers as a tragedy); H.R. DOC. NO. 138, 90th Cong., 1st Sess. 9 (1967) ("Every witness who testified before the committee expressed deep and growing concern regarding the incidence of impairment by alcohol in relation to highway accidents."); *infra* notes 172-74 and accompanying text (discussing social stigma associated with DWI).

11. This Note deals with the right to a jury trial under federal constitutional law. States remain free to grant the right to a jury trial for petty offenses. *See infra* note 20.

Many DWI lawyers believe that DWI defendants fare better in a jury trial. *See* 4 R. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 37.01, at 37-4 (3d ed. 1987) (stating jury trial is preferable because jurors are likely to have experience with alcohol and judges are reluctant to acquit); H. KALVEN & H. ZEISEL, THE AMERICAN JURY 68, 71, 295-96 (1966) (stating juries tend to be more lenient than judges to drunk drivers); Hollander, *Defending a Drunk Driver*, 10 LITIGATION 25, 28 (1984) (stating that defendant is more likely to raise doubt with the jury because judges are "practically immune" to DWI defenses). In addition, many people believe that drunk driving laws are too severe. Jury discretion therefore tends to limit the enforcement of DWI laws. *See* H. KALVEN & H. ZEISEL, *supra*, at 287, 293-96, 308-10.

12. A *petty offense* is defined as "[a] crime, the maximum punishment for which is generally a fine or short term in jail or house of correction. In some states, it is a classification in addition to misdemeanor and felony." BLACK'S LAW DICTIONARY 1032 (5th ed. 1979).

the right to a jury trial attaches.[14] When making such a determination, most courts focus on the potential length of imprisonment. If the court views the potential prison sentence as severe, the offense will be deemed a serious offense and the right to a jury trial will be available to the defendant. The sentence for DWI, however, is likely to include significant penalties other than imprisonment.[15] As a result, courts using imprisonment-focused criteria[16] for determining the right to a

13. For purposes of the federal constitutional right to trial by jury, a serious offense is any crime that is not classified as petty. *See id.* at 1226.

Historically, the right to a jury trial protected only those defendants charged with serious offenses; a judge heard trials for petty offenses. In the sixteenth century the English parliament, primarily because of congestion in English courts, enacted statutes creating a class of minor offenses to be tried without a jury under the summary disposition of a judge. The scope of the exception continually grew, and by 1776 more than 100 different offenses were prosecuted before a judge. All of the American colonies also resorted to summary disposition of many offenses under the petty offense exclusion. *See* Frankfurter & Corcoran, *Petty Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 934-65 (1926). During the colonial period, "acts were dealt with summarily which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light." *Id.* at 980-81. *See generally* G. RADCLIFFE & G. CROSS, THE ENGLISH LEGAL SYSTEM 98-112 (5th ed. 1971) (discussing Star-chamber trials of misdemeanor offenses).

Courts and commentators agree that the framers of the Constitution accepted and intended to maintain the petty offense exception, even though they did not include it in the Constitution. *See* Duncan v. Louisiana, 391 U.S. 145, 160 (1968) (finding no substantial evidence that framers intended to depart from common-law practice of trying petty offenses without juries); *Ex parte* Grossman, 269 U.S. 87, 108 (1925) (interpreting Constitution by reference to common law at time of framing), *overruled on other grounds*, INS v. Chadha, 462 U.S. 919 (1983); Schick v. United States, 195 U.S. 65, 70 (1904) (stating that framers' intent was to exclude petty offenses from right to jury trial); Frankfurter & Corcoran, *supra*, at 967-75 (stating that framers recognized petty offense exception and did not intend to extend right beyond established practice). *But see* Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959) (arguing that framers intended right to jury trial for all offenses).

14. *See* Landry v. Hoepfner (Landry II), 840 F.2d 1201, 1214 (5th Cir. 1988) (en banc) (holding that DWI is petty offense when maximum imprisonment does not exceed six months), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); Landry v. Hoepfner (Landry I), 818 F.2d 1169, 1176 (5th Cir. 1987) (holding that DWI is serious offense due to statutory penalties and collateral consequences), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); United States v. Sain, 795 F.2d 888, 891 (10th Cir. 1986) (holding DWI is petty offense); United States v. Jenkins, 780 F.2d 472, 475 (4th Cir.) (holding DWI is petty offense based on maximum statutory imprisonment), *cert. denied*, 476 U.S. 1161 (1986); United States v. Craner, 652 F.2d 23, 27 (9th Cir. 1981) (holding DWI is serious offense because of combined penalties of imprisonment, license revocation, and fine).

15. *See infra* notes 113-37 and accompanying text.

16. *See infra* notes 28-35, 98-102 and accompanying text. Courts also have

jury trial often experience difficulty in deciding whether that right extends to the DWI defendant.[17]

This Note examines when a DWI defendant should have a federal constitutional right to a jury trial.[18] Part I reviews the criteria courts use to determine whether a criminal defendant has the right to trial by jury and Part II examines how federal courts view this right with respect to the DWI defendant. Part III critiques the three lines of analysis that courts use in determining whether a DWI statute affords a defendant the right to a jury trial. Part IV argues that courts should consider all the statutory penalties in determining the right to a jury trial in DWI cases, but should not take into account any collateral consequences of a conviction. The Note concludes that because of the unique nature and variety of statutory penalties for DWI, the right to a jury trial should be constitutionally guaranteed if the statute imposes substantial penalties of any sort.

I. DISTINGUISHING PETTY AND SERIOUS OFFENSES: THE SUPREME COURT'S CRITERIA

The United States Constitution does not distinguish between petty and serious offenses.[19] The United States Supreme

used other criteria, such as collateral consequences, in deciding whether the right to a jury trial attaches. *See infra* notes 48-52, 167-82 and accompanying text.

17. *See* 4 R. ERWIN, *supra* note 11, § 37.02, at 37-5 (noting "distinction between serious and petty offenses remains unclear, particularly in [DWI cases]"); *see also supra* note 14; infra notes 59-89 and accompanying text.

18. The sixth amendment jury trial right applies to the states through the fourteenth amendment due process clause. *See* Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968).

Courts are more seriously divided on the right to a jury trial for DWI than on any other jury right issue. At least 10 courts have held that DWI is a serious offense even when the imprisonment possible does not exceed six months. *See supra* note 14; *infra* note 88. In contrast, courts have found that defendants have a right to a trial by jury in only four recent non-DWI cases when potential imprisonment did not exceed six months. *See infra* note 34; *see also* 4 R. ERWIN, *supra* note 11, § 37.01, at 37-5 (noting division among state courts on whether DWI is serious offense).

19. The early American colonists cherished the right to a trial by jury. Examples of documents that incorporated this right include King James I's Instructions for the Government of the Colony of Virginia, 1606; Massachusetts Body of Liberties, 1628; Concessions and Agreements of West New Jersey, 1677; and Frame of Government of Pennsylvania, 1682. *See* L. MOORE, THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY 97-99 (1973); R. PERRY & J. COOPER, SOURCES OF OUR LIBERTIES 37, 74, 185, 217 (1959). The jury right was often advocated in response to British tyranny. *See* Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (framers of early constitutions included right to jury trial to protect against unfounded charges designed to eliminate enemies); R.

Court, however, has enunciated criteria that courts should consider when determining whether an offense is petty or serious.[20] The most important of these criteria is the severity of

PERRY & J. COOPER, *supra*, at 261-69; *cf.* THE FEDERALIST NO. 83, at 581-82 (A. Hamilton) (H. Dawson ed. 1864) (stating that reason for high regard for jury trials was belief that juries would prevent arbitrary and oppressive government). As a result, many of this country's principal documents include a jury trial guarantee. *See* Jacobs, *Trial by Jury, Petty Offenses, and the First Amendment*, 46 N.D. LAW. 295, 295 (1971) (stating "the right to trial by jury in criminal prosecutions was the only procedural safeguard guaranteed by the constitutions and bills of rights of all the original states"); *see generally* R. PERRY & J. COOPER, *supra* (examining major colonial documents and early state constitutions). The Declaration of Independence also included the jury trial protection. The Declaration of Independence para. 2, 20 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations . . . depriving us, in many cases, of the benefits of Trial by Jury."). The framers of the Constitution included the jury trial guarantee in article III. U.S. CONST. art. III, § 2, cl. 3 ("[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"). In addition, the guarantee was later included in the Bill of Rights. U.S. CONST. amend. VI. ("[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"). The jury trial provisions of article III and of the sixth amendment do not differ with regard to the grade of offense giving rise to the jury right. *See* Callan v. Wilson, 127 U.S. 540, 549-51 (1888); *see also supra* note 13 (framers intended to maintain distinction between petty and serious offenses).

The use of jury trials dates back to ancient Greece. *See* M. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 14-28 (1894) (discussing *dikasts*, juries of ancient Greece). The recorded history of jury trials is often incomplete and open to debate. For a thorough examination of the history of the jury trial, see generally P. DEVLIN, TRIAL BY JURY (1956); W. FORSYTH, HISTORY OF TRIAL BY JURY (1876); 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 298-350 (7th ed. 1956); M. LESSER, *supra*; Frankfurter & Corcoran, *supra* note 13, at 922-65.

20. *See Duncan*, 391 U.S. at 160 (stating that in absence of constitutional definition, courts must make the petty or serious distinction); 4 R. ERWIN, *supra* note 11, § 37.02, at 37-6 (stating "the task of separating the petty from serious infractions must be done by the courts"); *see also infra* notes 28-55 and accompanying text (discussing statutory penalties, common-law tests, and collateral consequences); *see generally* Annotation, *Distinction Between "Petty" and "Serious" Offenses for Purposes of Federal Constitutional Right to Trial by Jury—Supreme Court Cases*, 26 L. ED. 2D 916 (1971) (discussing Supreme Court's right to jury trial cases and criteria).

Each of the 50 states has a constitutional provision guaranteeing the right to a jury trial that, in many instances, is more extensive than the federal constitutional right. *See* Note, *The Petty Offense Exception and the Right to a Jury Trial*, 48 FORDHAM L. REV. 205, 212 n.51 (1979) (listing states' constitutional jury right provisions). States may, under their own laws, grant greater scope to the right to trial by jury than the United States Constitution affords. *Cf.* Oregon v. Haas, 420 U.S. 714, 719 (1975) (stating that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than . . . necessary upon federal constitutional standards"). Several states do not exclude petty offenses from the right to a jury trial. *See, e.g.*, Baker v. City of

the maximum statutory penalty.[21] In addition, courts may consider the traditional common-law tests:[22] the nature of the offense,[23] whether the offense was malum in se,[24] and whether the offense was indictable at common law.[25] Some Justices also encourage an examination of the nonstatutory collateral consequences[26] of a conviction.[27]

In its most recent opinions on the right to trial by jury,[28] the Supreme Court has emphasized that the most relevant criterion is the maximum possible statutory penalty[29] for the offense in question.[30] In *Baldwin v. New York*,[31] the Court held

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Fairbanks, 471 P.2d 386, 401 (Alaska 1970) (holding that defendants have jury right whether accused of violation of state law or municipal ordinance); Mills v. Municipal Court, 10 Cal.3d 288, 298, 515 P.2d 273, 280, 110 Cal. Rptr. 329, 336 (1973) (stating that "every misdemeanor defendant has a right to a trial by jury"); Brenner v. City of Casper, 723 P.2d 558, 561 (Wyo. 1986) (holding state constitution requires jury trial for any length of imprisonment); *see generally* 4 R. ERWIN, *supra* note 11, § 37.03 (discussing statutory right to jury trial for DWI).

21. *See infra* note 30.

22. Some of these common-law tests were laid out in Cheff v. Schnackenberg, 384 U.S. 373, 390 (1966) (Douglas, J., dissenting) ("The principal inquiry . . . relates to the character and gravity of the offense itself. Was it an indictable offense at common law? Is it *malum in se* or *malum prohibitum*? What stigma attaches to those convicted of committing the offense?").

23. *See infra* notes 37-39 and accompanying text.

24. *See infra* notes 40-45 and accompanying text.

25. *See infra* notes 46-47 and accompanying text.

26. *Collateral consequences* in this Note refers only to the nonstatutory consequences affecting the individual charged with or convicted of an offense. Several courts have used the term to refer to statutory penalties beyond imprisonment (for example, license revocation). *See* United States v. Craner, 652 F.2d 23, 25 (9th Cir. 1981); United States v. Woods, 450 F. Supp. 1335, 1347 (D. Md. 1978). This Note therefore defines *statutory penalty* more broadly than several courts do by including license revocation, community service, and all state-imposed sanctions in the definition.

27. *See infra* notes 48-52 and accompanying text.

28. The Supreme Court has not decided a major criminal right to jury trial case, other than criminal contempt cases, since 1970. *See* Baldwin v. New York, 399 U.S. 66, 74 (1970); 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 21.1(b) (1984 & Supp. 1988) (discussing *Baldwin* and other major criminal right to jury trial cases).

29. In determining the right to trial by jury, as opposed to the right to counsel, courts traditionally have looked at the maximum potential consequences, not the actual consequences, of the offense. *Compare* Duncan v. Louisiana, 391 U.S. 145, 159-62 & n.35 (1968) (basing jury trial right determination on possible penalty) *with* Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (basing right to counsel on any actual incarceration) *and* Argersinger v. Hamlin, 407 U.S. 25, 38-40 (1972) (same).

30. *See* Baldwin v. New York, 399 U.S. 66, 68 (1970) (stating that "the most relevant . . . criteri[on] [is] the severity of the maximum authorized penalty"); Frank v. United States, 395 U.S. 147, 148 (1969) (stating that severity of

that any offense carrying a possible imprisonment of more than six months is a serious crime, allowing the defendant to invoke the right to a jury trial.[32] Although the *Baldwin* Court held that possible imprisonment for more than six months is a penalty severe enough to activate the right to a jury trial, the Court did not hold that such possible imprisonment is a necessary condition.[33] The Court continues to recognize that a defendant not subject to possible imprisonment of more than six months may nonetheless be able to invoke the right to a jury trial.[34] Moreover, the Court has never overruled earlier cases in which it held certain offenses to be serious even though the possible imprisonment did not exceed six months.[35]

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authorized penalty is "the most relevant indication of the seriousness of an offense"); Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (stating that "the penalty authorized for a particular crime is of major relevance").

31. 399 U.S. 66 (1970). In *Baldwin*, the defendant was charged with the misdemeanor of "jostling" (pickpocketing), which carried a maximum imprisonment of one year. *Id.* at 67.

32. *Id.* at 69. The Court has often noted that in the late eighteenth century offenses triable without a jury were primarily those punishable by no more than a six-month term of imprisonment. *See* Duncan v. Louisiana, 391 U.S. 145, 161 (1968); District of Columbia v. Clawans, 300 U.S. 617, 626 (1937); Frankfurter & Corcoran, *supra* note 13, at 934; *see also* Frank v. United States, 395 U.S. 147, 149 (1969) (holding that possible two-year imprisonment indicates offense is serious).

33. *See Baldwin*, 399 U.S. at 69 n.6 (stating "we decide only that a potential sentence in excess of six months' imprisonment is *sufficiently severe by itself* to take the offense out of the category of 'petty' ") (emphasis added); *see also id.* at 73 (stating that jury right may be outweighed when imprisonment does not exceed six months); Duncan v. Louisiana, 391 U.S. 145, 159 (1968) ("Crimes carrying possible penalties up to six months do not require a jury trial *if they otherwise qualify as petty offenses.*") (emphasis added); United States v. Craner, 652 F.2d 23, 25 (9th Cir. 1981) (noting that no Justice has ever stated that if imprisonment does not exceed six months, court must classify offense as petty); 2 W. LAFAVE & J. ISRAEL, *supra* note 28, § 21.1, at 691, 693 (stating *Baldwin* did not hold that offenses punishable by six or fewer months are petty); *infra* notes 103-12 and accompanying text.

34. *See* District of Columbia v. Colts, 282 U.S. 63, 73-74 (1930) (reckless driving); Callan v. Wilson, 127 U.S. 540, 556-57 (1888) (conspiracy).

In only four recent non-DWI cases have courts found a right to a jury trial when the possible imprisonment did not exceed six months. *See* United States v. Sanchez-Meza, 547 F.2d 461, 464 (9th Cir. 1976) (conspiracy to deceive immigration officials); United States v. Thomas, 574 F. Supp. 197, 198-99 (D.D.C. 1983) (placement of "structure" on White House sidewalk), *aff'd*, 753 F.2d 167 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 873 (1985); State v. Superior Court, 121 Ariz. 174, 175-76, 589 P.2d 48, 49-50 (Ariz. Ct. App. 1978) (shoplifting); Reed v. State, 470 So. 2d 1382, 1384 (Fla. 1985) (criminal mischief); *see also supra* note 14; *infra* note 88 (noting that at least ten courts have found that DWI is serious offense when imprisonment does not exceed six months).

35. *See* 2 W. LAFAVE & J. ISRAEL, *supra* note 28, § 21.1, at 693 (stating that *Baldwin* does not disturb decisions that provide another basis for right to

The Court also has used three different criteria based on the common law to determine whether an offense is petty or serious.[36] The nature of the offense test requires a court to consider the seriousness of the crime, rather than the severity of the penalty, to determine whether the crime is a petty or serious offense. If a court determines that a particular offense is of grave character or involves moral turpitude, the crime is serious and the defendant may invoke the right to a jury trial.[37] For example, the Supreme Court has held that reckless driving[38] and conspiracy[39] are of a grave character and therefore are serious offenses.

Another common-law test, closely related to the nature of the offense test, requires a court to determine whether an offense is malum prohibitum[40] or malum in se[41]—that is, whether

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jury trial); 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 2D § 371, at 295 (1982 & Supp. 1988) (stating that "cases on the books, and never overruled, suggest that some crimes are sufficiently serious that they carry a constitutional right of jury trial regardless of the penalty authorized"); *see also supra* notes 33-34; *infra* note 109 and accompanying text.

36. The Supreme Court has not applied these common-law criteria consistently; in more recent opinions the statutory penalty has become the primary criterion. *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 68-70 (1970) (considering "severity of the maximum authorized penalty"); Duncan v. Louisiana, 391 U.S. 145, 159-61 (1968) (stating "the penalty authorized for a particular offense is of major relevance"); *see also supra* notes 28-35 and accompanying text (discussing recent cases and emphasis on authorized statutory penalty); *see generally* 2 W. LAFAVE & J. ISRAEL, *supra* note 28, § 21.1 (discussing right to jury trial and definition of petty offense).

37. *See* District of Columbia v. Clawans, 300 U.S. 617, 625 (1937) (holding that illegal dealing in property involves no moral turpitude); District of Columbia v. Colts, 282 U.S. 63, 73 (1930) (holding that reckless driving is grave offense); Schick v. United States, 195 U.S. 65, 67 (1904) (holding that purchase of unbranded oleomargarine involves no moral delinquency); Natal v. Louisiana, 139 U.S. 621, 624 (1891) (holding that public market violation is petty offense); Callan v. Wilson, 127 U.S. 540, 556 (1888) (holding that conspiracy is offense of grave character); *see generally* Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117 (1929) (detailing crimes considered to involve moral turpitude).

Many lower courts continue to use the nature of the offense test. *See, e.g.*, State v. Superior Court, 121 Ariz. 174, 175-76, 589 P.2d 48, 49 (Ariz. Ct. App. 1978) (holding that shoplifting involves moral turpitude); State v. Wilke, 291 N.W.2d 792, 794 (S.D. 1980) (holding that failure to display automobile sticker is not morally offensive); *see also infra* notes 140-43 and accompanying text.

38. District of Columbia v. Colts, 282 U.S. 63, 73 (1930); *see infra* notes 43-44 and accompanying text.

39. *Callan*, 127 U.S. at 556.

40. *Malum prohibitum* is defined as "a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law." BLACK'S LAW DICTIONARY 865 (5th ed. 1979) (emphasis in original).

the act is simply prohibited or is inherently wrong.[42] If a court determines that an offense is inherently wrong or malum in se, the defendant may invoke the right to a jury trial. In *District of Columbia v. Colts*,[43] the Supreme Court held that reckless driving was a malum in se offense,[44] marking the only time the Court has ever made a malum in se finding.[45]

In addition, the Court has found the right to a jury trial if the offense was indictable at common law at the time the United States Constitution was adopted.[46] If a defendant could

41. *Malum in se* is defined as "[a] wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law." *Id.*

42. Despite the similarity to the nature of the offense test, the Court in *Colts* used this as a separate line of inquiry. *Colts*, 282 U.S. at 73 (reckless driving is malum in se offense); *see also* Cheff v. Schnackenberg, 384 U.S. 373, 390 (1966) (Douglas, J., dissenting) (encouraging use of malum in se test); *see generally* Note, *The Distinction Between Mala Prohibita and Mala In Se in Criminal Law*, 30 COLUM. L. REV. 74 (1938) (examining history of distinction as well as its significance and utility).

Many lower courts continue to use the malum in se test. *See, e.g.*, United States v. Arbo, 691 F.2d 862, 864 (9th Cir. 1982) (holding that interference with forest officers is malum prohibitum); United States v. Stewart, 568 F.2d 501, 503 (6th Cir. 1978) (holding that assault is malum prohibitum); United States v. Sanchez-Meza, 547 F.2d 461, 464 (9th Cir. 1976) (holding that conspiracy is malum in se); United States v. Morrison, 425 F. Supp. 1235, 1239 (D. Md. 1977) (holding that speeding is malum prohibitum); Reed v. State, 470 So. 2d 1382, 1384 (Fla. 1985) (holding that criminal mischief is malum in se); *see also infra* notes 144-49 and accompanying text.

43. 282 U.S. 63 (1930). Although the penalty for reckless driving of an automobile was a $100 fine and 30 days' imprisonment, the Court in *Colts* held that the offense was serious, partly because the offense "shocks the general moral sense." *Id.* at 73.

44. *Id.* (stating that offense "is not merely *malum prohibitum*, but in its very nature is *malum in se*").

45. *See infra* note 151; *see also supra* note 42 and accompanying text (discussing use and history of malum in se).

46. *See* District of Columbia v. Clawans, 300 U.S. 617, 624-25 (1937) (finding that sale of second-hand property was not indictable at common law); *Colts*, 282 U.S. at 73 (finding reckless driving similar to common-law offense of public nuisance); Schick v. United States, 195 U.S. 65, 68 (1904) (finding knowing purchase of oleomargarine not indictable at common law); Callan v. Wilson, 127 U.S. 540, 555-56 (1888) (finding conspiracy indictable at common law); *see generally* Frankfurter & Corcoran, *supra* note 13, at 934-65 (examining offenses indictable at common law in the colonies).

Lower courts also continue to use the indictable at common law test. *See, e.g.*, United States v. Sanchez-Meza, 547 F.2d 461, 464 (9th Cir. 1976) (finding conspiracy indictable at common law); United States v. Newberne, 427 F. Supp. 361, 362 (E.D. Ky. 1977) (finding assault not indictable); State v. Superior Court, 121 Ariz. 174, 176, 589 P.2d 48, 50 (Ariz. Ct. App. 1978) (finding shoplifting related to common-law offense of larceny); Reed v. State, 470 So. 2d 1382, 1384 (Fla. 1985) (finding criminal mischief indictable).

not be indicted at common law for a particular offense, but a similar offense was indictable at common law, the Court also has found the right to trial by jury.[47]

Supreme Court precedent does not mandate that a court consider the collateral consequences[48] of a conviction when determining whether the right to a jury trial exists. Two Justices, however, have urged the adoption of a collateral consequences test,[49] which requires a court to consider not only the statutory penalties, but also all other consequences of a conviction. Many federal and state courts have examined collateral consequences, primarily in DWI cases,[50] because a DWI conviction can result in significant nonstatutory consequences, including financial costs[51] and public scorn.[52] For example, if there are significant

47. The Supreme Court has never clearly specified what constitutes sufficient similarity or how courts should use common-law principles. *See Colts*, 282 U.S. at 71-73; United States v. Woods, 450 F. Supp. 1335, 1342-44 (D. Md. 1978); *infra* notes 153-62 and accompanying text.

48. For this Note's definition of *collateral consequences*, see *supra* note 26; *see also* 1 R. ERWIN, *supra* note 11, § 2B.01, at 2B-1 (noting that additional nonjudicial consequences inevitably flow to drunk driver).

49. *See* Welsh v. Wisconsin, 466 U.S. 740, 762-63 (1984) (White, J., dissenting, joined by Rehnquist, J.) (stating that courts should consider collateral consequences, especially in DWI cases); *cf.* Baldwin v. New York, 399 U.S. 66, 69 (1970) ("the collateral consequences attaching to a felony conviction are more severe than those attaching to a conviction for a misdemeanor"); Cheff v. Schnackenberg, 384 U.S. 373, 390 (1966) (Douglas, J., dissenting) ("What stigma attaches to those convicted of committing the offense?"). Some lower courts have interpreted *Baldwin* as specifically authorizing an examination of collateral consequences. *See* United States v. Woods, 450 F. Supp. 1335, 1345 (D. Md. 1978).

50. *See, e.g.*, Landry v. Hoepfner, 818 F.2d 1169, 1177 (5th Cir. 1987) (considering suspension of driving privileges, attendance at alcohol treatment center, and increased insurance costs), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); United States v. Jenkins, 780 F.2d 472, 474 (4th Cir.) (considering community service, treatment programs, and the national public attitude toward DWI), *cert. denied*, 476 U.S. 1161 (1986); United States v. Craner, 652 F.2d 23, 25 (9th Cir. 1981) (considering suspension of driving privileges); Bronson v. Swinney, 648 F. Supp. 1094, 1100-01 (D. Nev. 1986) (considering social stigma attached to driving while intoxicated); United States v. Thomas, 574 F. Supp. 197, 198 (D.D.C. 1983) (noting that incarceration would take away defendant's constitutional right to maintain protest), *aff'd*, 753 F.2d 167 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 873 (1985); United States v. Woods, 450 F. Supp. 1335, 1347 (D. Md. 1978) (considering suspension of driving privileges); Brady v. Blair, 427 F. Supp. 5, 9-10 (S.D. Ohio 1976) (considering license suspension and ethical condemnation); Rothweiler v. Superior Court, 100 Ariz. 37, 44-45, 410 P.2d 479, 484-85 (1966) (en banc) (same); Parham v. Municipal Court, 86 S.D. 531, 538, 199 N.W.2d 501, 505 (1972) (considering suspension of driving privileges).

51. *See infra* notes 169-71 and accompanying text.

52. *See infra* notes 172-74 and accompanying text; Argersinger v. Hamlin,

attorney's fees, loss of a job, or other substantial costs of complying with the statutory penalties, a judge applying this test could grant the right to a jury trial.

Thus, although an offense that carries a possible prison sentence of more than six months is always a serious crime that triggers the right to a jury trial, a DWI defendant also may invoke this right in other circumstances. Lower courts have found that a federal constitutional right to a jury trial can arise from other statutory penalties,[53] common-law criteria,[54] or collateral consequences of a conviction.[55]

II. DRIVING WHILE INTOXICATED: PETTY OR SERIOUS OFFENSE?

Although legislative bodies define the statutory penalties for DWI, courts must determine whether a DWI defendant has a right to a jury trial.[56] While *Baldwin*'s six-month standard sets one clear threshold for granting the right,[57] federal and state courts have had difficulty in determining which offenses with a maximum imprisonment of six months or less, especially DWI, are nonetheless serious.[58]

In *United States v. Craner*,[59] the Ninth Circuit[60] held that a defendant charged with DWI in a national park had the right to a jury trial because the defendant faced the possibility of a six-

407 U.S. 25, 48 (1972) (Powell, J., concurring) (noting that stigma attaches after drunk-driving conviction); Brady v. Blair, 427 F. Supp. 5, 9 (E.D. Ohio 1976) (noting that community condemns a drunk driver).

53. *See infra* notes 113-37 and accompanying text.

54. *See infra* notes 138-66 and accompanying text.

55. *See infra* notes 167-82 and accompanying text.

56. *See* Duncan v. Louisiana, 391 U.S. 145, 160 (1968) ("In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must . . . pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial . . . .").

57. *See supra* notes 31-32 and accompanying text.

58. *See supra* note 14; *infra* note 88 and accompanying text.

59. 652 F.2d 23 (9th Cir. 1981).

60. Craner was arrested for DWI in Yosemite National Park, a federal jurisdiction. Craner therefore was prosecuted in federal court. *Id.* at 24. Federal law applied because DWI in a national park violates regulations promulgated by the Secretary of the Interior. *Id.* Federal district courts also have jurisdiction over DWIs committed on federal military reservations, *see infra* note 68, and federal courts consider DWI offenses brought before them on petition for a writ of habeas corpus; *see* Landry v. Hoepfner, 818 F.2d 1169, 1170 (5th Cir. 1987), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH).

month imprisonment, a $500 fine,[61] and a six-month license revocation.[62] The court found that the United States Supreme Court holding in *Colts*[63] mandated designating DWI as a serious offense because DWI is analogous to reckless driving and thus is malum in se.[64] Moreover, the *Craner* court emphasized that the community perceived DWI to be a serious offense, as indicated by the possible license revocation and by the widespread granting of the right to a jury trial.[65]

In *United States v. Jenkins*,[66] a Fourth Circuit case, three defendants were charged with DWI on a South Carolina military reservation.[67] South Carolina law[68] mandated that courts impose a minimum penalty and allowed possible penalties of a thirty-day imprisonment, a $200 fine, a six-month license revocation, and community service.[69] The *Jenkins* court held that the South Carolina DWI statute was lenient because it allowed imprisonment up to only thirty days[70] and thus the defendants did not have the right to a jury trial.[71] Although the court used the nature of the offense test[72] and examined a variety of collateral consequences,[73] it relied primarily on the maximum

61. *Craner*, 652 F.2d at 24. In addition to these penalties, court costs could be assessed against the defendant. *Id.*

62. *Id.* at 25. The defendant's license could be revoked pursuant to the governing California statute. *Id.*

63. District of Columbia v. Colts, 282 U.S. 63, 73 (1930); *see supra* notes 43-44 and accompanying text.

64. *Craner*, 652 F.2d at 26. The court also emphasized that Congress had authorized the Secretary of the Interior to set only such a penalty and nothing more severe. *Id.*

65. *Id.* at 26-27.

66. 780 F.2d 472 (4th Cir.), *cert. denied*, 476 U.S. 1161 (1986).

67. *Id.* at 473.

68. DWI offenses that occur on United States military bases are prosecuted in federal court pursuant to the Assimilative Crimes Act, 18 U.S.C. § 13 (1982). The Assimilative Crimes Act "adopts state law to define the elements of the offense and to establish the appropriate range of punishment." United States v. Sain, 795 F.2d 888, 890 (10th Cir. 1986). Thus, South Carolina law governed Jenkins's case. The purpose of 18 U.S.C. § 13 is to punish crimes committed on federal bases in the same way they would be punished in the surrounding jurisdictions. *Id.* The *Sain* court determined that application of state law pursuant to 18 U.S.C. § 13 does not include applying the state's law regarding the right to a jury trial. *Id.*

69. *Jenkins*, 780 F.2d at 473 (citing S.C. CODE ANN. §§ 56-5-2940, 56-5-2990 (Law. Co-op. Supp. 1987)). The mandatory minimum penalty was either a 48-hour jail term or 48 hours' community service. *Id.*

70. *Id.* at 474.

71. *Id.*

72. *Id.* at 475.

73. *Id.* The statutory penalties and collateral consequences the court examined included the mandatory minimum penalty, community service, a treat-

statutory penalty test.[74]

The Tenth Circuit, in *United States v. Sain*,[75] reviewed a DWI conviction under Oklahoma law, which provided only one statutory penalty—a maximum fine of $300.[76] The court, relying on a federal statute[77] defining petty offenses as those with penalties that do not exceed six months' imprisonment or a $500 fine, held that the offense was not serious, and thus denied the defendant the right to a jury trial.[78]

The Fifth Circuit considered a DWI defendant's habeas corpus petition in *Landry v. Hoepfner* (*Landry I*).[79] The Louisiana DWI statute mandated a minimum penalty[80] and provided for maximum penalties of a six-month imprisonment, a $500 fine, participation in a substance-abuse program,[81] and a sixty-day license suspension.[82] The court determined that DWI was a serious offense based on the variety of statutory penalties, public hostility toward drunk drivers, and the economic costs of a conviction.[83] The en banc Fifth Circuit opinion, *Landry v. Hoepfner* (*Landry II*),[84] however, reversed[85] because the possible imprisonment did not exceed six months[86] and DWI was not an offense indictable at common law.[87]

The disagreement in the federal and state courts[88] concern-

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ment program, license suspension, and the national public attitude toward DWI. *Id.*

74. *Id.*

75. 795 F.2d 888 (10th Cir. 1986). The right to a jury trial was only one of several issues the circuit court decided. *See id.* at 890-92; *supra* note 68.

76. *Sain*, 795 F.2d at 890 (citing OKLA. STAT. ANN. tit. 47, § 761 (1981)).

77. *Id.* at 891 (citing 18 U.S.C. § 1(3) (1982)).

78. *Id.*; *see infra* note 112 and accompanying text.

79. 818 F.2d 1169, 1171 (5th Cir. 1987), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH).

80. *Id.* (providing for mandatory two-day jail term or four days of community service).

81. *Id.* (citing LA. REV. STAT. ANN. § 14:98 (West 1984)).

82. *Id.* (citing LA. REV. STAT. ANN. § 32:414 (West 1984)).

83. *Id.* at 1174-77.

84. 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed*, U.S.L.W. (U.S. June 13, 1988) (No. 88-5043-CFH).

85. The dissent in *Landry II* adopted the majority opinion in *Landry I*. *Id.* at 1220 (Garza, J., dissenting).

86. *Id.* at 1209.

87. *Id.*

88. *Compare* Whirley v. State, 450 So. 2d 836, 838 (Fla. 1984) (per curiam) (finding no right to trial by jury for DWI), City of Monroe v. Wilhite, 255 La. 838, 841-42, 233 So. 2d 535, 536 (no jury right), *cert. denied*, 400 U.S. 910 (1970), State v. Lynch, 223 Neb. 849, 856-57, 394 N.W.2d 651, 658-59 (1986) (no jury right), Blanton v. North Las Vegas Mun. Court, 103 Nev. 623, 633, 748 P.2d 494, 501 (1987) (no jury right), *cert. granted*, 108 S. Ct. 2843 (1988), State v. Morrill,

ing DWI demonstrates both that the courts have been unable to clearly distinguish serious and petty offenses and that the courts have failed to apply consistent standards in determining the right to a jury trial.[89] Courts have not satisfactorily decided the relative importance of the statutory penalties,[90] the common-law tests,[91] or the collateral consequences[92] as applied to DWI offenses. A consistent, fair determination of the right to trial by jury for DWI defendants requires an analysis of each of these criteria.

III. CRITERIA FOR DETERMINING WHETHER THE RIGHT TO A JURY TRIAL APPLIES TO DWI DEFENDANTS

A. THE STATUTORY PENALTIES

In its recent opinions considering the right to a jury trial,[93] including *Baldwin*,[94] the Supreme Court has established that the maximum possible statutory penalty[95] is the most impor-

123 N.H. 707, 712, 465 A.2d 882, 885 (1983) (no jury right), State v. Rodgers, 91 N.J.L. 212, 214-16, 102 A. 433, 434-35 (1917) (no jury right), *and* City of Albuquerque v. Arias, 64 N.M. 337, 338, 328 P.2d 593, 594 (1958) (no jury right) *with* Rothweiler v. Superior Court, 100 Ariz. 37, 47, 410 P.2d 479, 486 (1966) (en banc) (jury right), State v. O'Brien, 68 Haw. 39, 45, 704 P.2d 883, 886-87 (1985) (jury right), Fisher v. State, 305 Md. 357, 365-66, 504 A.2d 626, 630-31 (1986) (per curiam) (jury right), State v. Hoben, 256 Minn. 436, 441, 443-44, 98 N.W.2d 813, 817-19 (1959) (jury right), *and* Parham v. Municipal Court, 86 S.D. 531, 538, 199 N.W.2d 501, 505 (1972) (jury right); *cf.* State v. Dickson, 9 Kan. App. 2d 425, 426, 680 P.2d 313, 315 (1984) (holding DWI serious when one-year imprisonment possible).

Three federal district courts have found that DWI is a serious offense, even when punishable by fewer than six months' imprisonment. *See* Bronson v. Swinney, 648 F. Supp. 1094, 1100-01 (D. Nev. 1986); United States v. Woods, 450 F. Supp. 1335, 1348-49 (D. Md. 1978); Brady v. Blair, 427 F. Supp. 5, 10 (S.D. Ohio 1976). One federal district court has found DWI to be a petty offense. *See* United States v. Fletcher, 505 F. Supp. 1053, 1054 (W.D. Va. 1981); *see also supra* note 14 (laying out disagreement of federal circuit courts over designation of DWI as petty or serious).

89. *See* Duncan v. Louisiana, 391 U.S. 145, 160 (1968) (stating that "boundaries of the petty offense category have always been ill-defined, if not ambulatory"); United States v. Stewart, 568 F.2d 501, 502 (6th Cir. 1978) (stating that "task of delineating petty and serious offenses is not an easy one"); 4 R. ERWIN, *supra* note 11, § 37.02, at 37-5 (noting that "distinction between serious and petty offenses remains unclear," particularly in DWI cases).

90. *See supra* notes 28-35; *infra* notes 93-137 and accompanying text.

91. *See supra* notes 36-47; *infra* notes 138-66 and accompanying text.

92. *See supra* notes 48-52; *infra* notes 167-82 and accompanying text.

93. *See supra* note 28.

94. 399 U.S. 66 (1970).

95. *See supra* notes 28-35 and accompanying text.

tant factor for determining the right to trial by jury.[96] For the majority of offenses in most jurisdictions, imprisonment is the most significant statutory penalty. The offense of drunk driving, however, is unique, because DWI statutes usually embrace a wide variety of other penalties.[97] Therefore, consideration of imprisonment alone is not sufficient for a consistent, fair determination of whether a DWI defendant has the right to a jury trial.

1. *Baldwin*'s Bright-Line Test

The statutory imprisonment penalty often is an accurate reflection of the seriousness of an offense, because imprisonment for any length of time can have serious consequences.[98] Many state legislatures have determined that DWI deserves a significant period of possible imprisonment,[99] making the seriousness of the offense clear in these jurisdictions.[100] Even if the period of potential imprisonment does not exceed six months, however, and thus does not automatically trigger the jury right under *Baldwin*,[101] courts still should consider the severity of the possible imprisonment in connection with other factors.[102]

The Tenth Circuit in *Sain*, however, refused to consider any criteria beyond imprisonment, holding that the maximum statutory imprisonment should be the sole consideration when

96. *See supra* note 30.

97. *See* Appendix, *infra*; *see also infra* notes 113-37 and accompanying text (discussing statutory penalties other than imprisonment).

98. *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 73 (1970) ("the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty matter' ").

99. *See* Appendix, *infra* (22 states provide for more than six months' possible imprisonment and 16 states allow six months).

100. Since *Baldwin*, no court has denied the right to a jury trial when the possible imprisonment exceeded six months. *E.g.*, State v. Dickson, 9 Kan. App. 2d 425, 426, 680 P.2d 313, 315 (1984) (DWI is serious offense and defendant has right to jury trial when one year's imprisonment possible).

101. *See supra* note 32 and accompanying text.

102. None of the defendants in *Craner*, *Jenkins*, *Sain*, or *Landry* faced the possibility of imprisonment for more than six months. *See* Landry v. Hoepfner, 818 F.2d 1169, 1172 (5th Cir. 1987), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc) (six months' possible imprisonment), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); United States v. Sain, 795 F.2d 888, 890 (10th Cir. 1986) (no imprisonment); United States v. Jenkins, 780 F.2d 472, 473 (4th Cir.) (30 days), *cert. denied*, 476 U.S. 1161 (1986); United States v. Craner, 652 F.2d 23, 24 (9th Cir. 1981) (six months); *see also infra* notes 123-37 and accompanying text (arguing that courts should consider other penalties together with potential length of imprisonment).

deciding whether to grant a DWI defendant the right to a jury trial.[103] *Sain* and similar federal and state opinions, holding that a right to a jury trial for DWI does not exist unless statutory imprisonment exceeds six months, have misinterpreted *Baldwin*,[104] criminal contempt cases,[105] or the federal statute defining petty offenses[106] as mandating petty offense classification when the possible imprisonment is six months or less.[107] Courts holding that an offense is petty because the possible imprisonment is six months or less are misguided, because the Supreme Court has never held that imprisonment for less than six months must result in an automatic classification of an offense as petty.[108] Morever, the Court has never overruled or

103. The *Sain* court used criminal contempt cases and 18 U.S.C. § 1(3), which defines as petty any offense for which the penalty does not exceed six months' imprisonment or a $500 fine or both, as the only criteria for determining the right to trial by jury. *Sain*, 795 F.2d at 891; *see infra* note 112 and accompanying text. In addition, the *Landry II* court ruled that there are only two tests to use when considering the right to a jury trial—possible imprisonment and whether the offense was indictable at common law. Landry v. Hoepfner, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH).

104. *See infra* note 107; *see also supra* notes 33-35; *infra* notes 108-12 and accompanying text (arguing *Baldwin* is not only test for jury trial right determination).

105. *See infra* note 107. The Supreme Court often emphasizes that criminal contempt is considered a petty offense. *See, e.g.*, Codispoti v. Pennsylvania, 418 U.S. 506, 511 (1974) (noting that criminal contempt by nature is not serious offense); Bloom v. Illinois, 391 U.S. 194, 211 (1968) (same); Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) (same). Criminal contempt cases therefore are usually considered a separate line of authority. *See* 2 C. WRIGHT, *supra* note 35, § 371, at 296.

106. *See infra* notes 107, 112.

107. *See, e.g.*, *Landry II*, 840 F.2d at 1207-09 (citing *Baldwin* and criminal contempt case; court also considered indictable at common law test); *Sain*, 795 F.2d at 891 (holding that federal statute and criminal contempt cases set dividing line); United States v. Fletcher, 505 F. Supp. 1053, 1054 (W.D. Va. 1981) (holding that federal statute and *Baldwin* were only criteria); State v. Webb, 335 So. 2d 826, 828 (Fla. 1976) (holding that *Baldwin* was only test); City of Monroe v. Wilhite, 255 La. 838, 841, 233 So. 2d 535, 536 (1970) (relying on state statute) *cert. denied*, 400 U.S. 910 (1970); Smith v. State, 17 Md. App. 217, 235-36, 301 A.2d 54, 61 (1973) (holding that *Baldwin* was only test); Blanton v. North Las Vegas Mun. Court, 103 Nev. 623, 632-33, 748 P.2d 494, 500 (1987) (holding that *Baldwin* and criminal contempt cases set dividing line), *cert. granted*, 108 S. Ct. 2843 (1988); State v. Zoppi, 196 N.J. Super. 596, 599-600, 483 A.2d 844, 845 (N.J. Super. Ct. Law Div. 1984) (relying on criminal contempt case and state law); *cf.* Matos v. Rodriguez, 440 F. Supp. 673, 676-77 (D.P.R. 1976) (holding that *Baldwin* was only criterion).

108. *See* Landry v. Hoepfner, 818 F.2d 1169, 1171-72 (5th Cir. 1987) (holding that *Baldwin* test is not necessarily exclusive), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); United States v. Craner, 652 F.2d 23, 25 (9th Cir. 1981) (noting that no member

repudiated its own or lower court cases holding that certain offenses for which the possible imprisonment does not exceed six months nonetheless are serious.[109] For example, in *Colts*[110] the Court held that reckless driving was a serious offense despite only ninety days' possible imprisonment.[111] Furthermore, the Court's interpretation and the legislative history of the federal statutory definition of petty offenses indicate that the definition does not preclude a judicial determination of the right to a jury trial for these offenses.[112] Thus, federal and state courts that rely solely on the length of possible imprisonment incorrectly ignore the relevance of the other statutory penalties.

2. Statutory Penalties Other Than Imprisonment

All DWI statutes impose penalties in addition to imprisonment.[113] The most common statutory penalty for a first-time

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of Court ever stated that less than six months' imprisonment requires petty classification); *see also supra* notes 33-35 and accompanying text.

109. *See supra* note 33. In United States v. Thomas, 474 U.S. 873 (1985), *denying cert. to* 753 F.2d 167 (D.C. Cir. 1984), *aff'g* 574 F. Supp. 197 (D.D.C. 1983), for example, the United States Supreme Court denied certiorari to a case in which the lower court had found the right to a jury trial, even though the possible imprisonment did not exceed six months. *See* 574 F. Supp. at 198-99. If *Baldwin* were the only criterion in the jury trial right determination, the Supreme Court probably would have reversed the lower court's holding in *Thomas*.

110. District of Columbia v. Colts, 282 U.S. 63 (1930).

111. *Id.* at 71, 73-74. By approving the nature of the offense test used in *Colts*, the *Baldwin* Court recognized the relevance of criteria other than the duration of imprisonment. *See* Baldwin v. New York, 399 U.S. 66, 69 n.6 (1970).

112. A federal statute, 18 U.S.C. § 1(3) (1982), defines a federal petty offense as "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both." In Muniz v. Hoffman, 422 U.S. 454 (1975), however, the Supreme Court made it clear that § 1(3) is not the sole definition of petty federal offenses. *Id.* at 475-76 (no "talismanic significance" attaches to the federal statutory definition); *see also* Duncan v. Louisiana, 391 U.S. 145, 160 (1968) (noting court's responsibility to make petty or serious distinction); *Craner*, 652 F.2d at 25 (noting that bright-line test was not determinative). In addition, the legislative history of § 1(3) does not indicate that the statute was meant to define crimes for which there was no right to trial by jury. *See* Duke v. United States, 301 U.S. 492, 494-95 (1937); Note, *Constitutional Law—Criminal Procedure—Criminal Contempt—The Right to Trial by Jury*—Muniz v. Hoffman, 1976 B.Y.U. L. REV. 549, 557-59.

113. All 50 states and the District of Columbia currently have statutes that make it a criminal offense to operate a motor vehicle under the influence of alcohol or other drugs. These statutes set a variety of penalties for the offense. *See* Appendix, *infra*; NATIONAL HIGHWAY TRAFFIC SAFETY COMM'N, U.S. DEP'T OF TRANSP., DIGEST OF STATE ALCOHOL-HIGHWAY SAFETY RELATED LEGISLATION (4th ed. 1986); *see also* Duncan v. Louisiana, 391 U.S. 145, 160

DWI offender is imprisonment, in some states for as long as two years.[114] In most jurisdictions the statutory punishment for DWI also includes the revocation or suspension of the defendant's driver's license for a period of two years or more.[115] In some states the license suspension extends significantly beyond possible imprisonment[116] and will have a more enduring impact.[117] Many people, and some courts, believe that license revocation is the most severe punishment for the drunk driver.[118] In addition, most states permit a court to impose a

(1968) (noting that legislatures set penalties, but courts make distinction between petty and serious offenses).

114. *See* Appendix, *infra* (Massachusetts, Pennsylvania, and Texas statutes provide for two years' possible imprisonment; 17 other states provide for one-year maximum).

115. *See id.* (32 states provide for possibility of at least six-month license revocation, 49 states make such provision for first-time DWI offenders).

116. In South Carolina, the possible duration of imprisonment is only 30 days, while the license revocation may last six months. *See* United States v. Jenkins, 780 F.2d 472, 474 (4th Cir.), *cert. denied*, 476 U.S. 1161 (1986); *see also* CONN. GEN. STAT. § 14-227a (1987) (authorizing three-month imprisonment, one-year revocation); KY. REV. STAT. ANN. § 189A.010 (Michie/Bobbs-Merrill Supp. 1988) (authorizing 30-day imprisonment, six-month revocation); MISS. CODE ANN. § 63-11-30 (Supp. 1987) (authorizing one-day imprisonment, one year maximum revocation); Appendix, *infra* (indicating that judges in most states have much more discretion over term of imprisonment than period of license revocation).

117. *See* State v. Zoppi, 196 N.J. Super. 596, 599-600, 483 A.2d 844, 845-46 (N.J. Super. Ct. Law Div. 1984) (possible 12-year revocation for third-time DWI offender without right to trial by jury); *see generally* Hagen, Williams & McConnell, *Effectiveness of License Suspension or Revocation for Drivers Convicted of Multiple Driving Under the Influence Offenses—An Overview of Three Studies*, 1 TRAFFIC SAFETY EVALUATION RES. REV. 13, 13-20 (1982) (evaluating effectiveness of license suspension as punishment of DWI offenders). In addition, some states have placed restrictions on the restoration of the driver's license. *See, e.g.*, Schecter v. Killingsworth, 93 Ariz. 273, 278, 380 P.2d 136, 139 (1963) (en banc) (noting that statute requires driver to show financial responsibility before license will be restored); Artis v. Rowland, 64 Wash. 2d 576, 580, 392 P.2d 815, 817 (1964) (en banc) (requiring proof of financial responsibility and statement of compliance with license suspension); GA. CODE ANN. § 40-5-7(c)-(d) (1985) (requiring proof of insurance coverage and the retaking of driving tests).

118. *See* H. KALVEN & H. ZEISEL, *supra* note 11, at 294, 309 (noting that many people think period of revocation is too severe); W. MIDDENDORFF, THE EFFECTIVENESS OF PUNISHMENT: ESPECIALLY IN RELATION TO TRAFFIC OFFENSES 103-06 (1968) (noting that community opinion regards loss of license as serious punishment).

The Fifth Circuit in *Landry I* and the Ninth Circuit in *Craner* appear to have viewed revocation as the most significant factor in granting the right to a jury trial for DWI. *See* Landry v. Hoepfner, 818 F.2d 1169, 1177 (5th Cir. 1987), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); United States v. Craner, 652 F.2d 23, 26 (9th Cir. 1981) ("the threat of loss of a license as important as a driver's license, a depri-

significant fine for a DWI conviction.[119] Some states also require substance-abuse treatment, educational programs,[120] and

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vation added to penal sanctions, is another sign that the [DWI] defendant's community does not view [DWI] as a petty offense"). The Supreme Court has recognized a due process property right that protects an individual's driver's license. *See* Mackey v. Montrym, 443 U.S. 1, 10 (1979); Bell v. Burson, 402 U.S. 535, 539 (1971).

Several lower courts, however, have held that driving a motor vehicle is a privilege controlled by the state and thus have not considered the revocation or suspension to be criminal punishment. *See* United States v. Jenkins, 780 F.2d 472, 745 (4th Cir.), *cert. denied*, 476 U.S. 1161 (1986); United States v. Best, 573 F.2d 1095, 1099 (9th Cir. 1978); State v. Coyle, 14 Ohio App. 3d 185, 186, 470 N.E.2d 457, 458 (1984); State v. Zoppi, 196 N.J. Super. 596, 601, 483 A.2d 844, 846 (N.J. Super. Law Div. 1984); City of Tucumcari v. Briscoe, 58 N.M. 721, 722, 275 P.2d 958, 958 (1954); *cf.* Smith v. State, 17 Md. App. 217, 235, 301 A.2d 54, 64 (1973) (finding that legislative purpose of revocation is public safety and welfare, not punishment). This rationale, however, ignores the necessity of motor vehicles and driver's licenses in modern society. Many courts, recognizing this necessity, consider the loss of a driver's license to be serious punishment. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 48 (1972) (Powell, J., concurring) (stating that loss of driver's license "is more serious for some individuals than a brief stay in jail"); Rothweiler v. Superior Court, 100 Ariz. 37, 44, 410 P.2d 479, 484-85 (1966) (en banc) ("the power to suspend the right to use the public highways should be protected by the fundamental individual right to a trial by jury"); State v. Hoben, 256 Minn. 436, 441-42, 98 N.W.2d 813, 817 (1959) ("revocation of license may have grave consequences[:] . . . the motor vehicle has clearly become a necessity to many people' "); Berberian v. Lussier, 87 R.I. 226, 231, 139 A.2d 869, 872 (1958) ("use of the automobile [is] a necessary adjunct to the earning of a livelihood in modern life"); *see generally* L. TAYLOR, DRUNK DRIVING DEFENSE § 1.5.3, at 68 (2d ed. 1986) (arguing license revocation distinguishes DWI from petty offenses).

119. *See* Appendix, *infra* (24 states allow $1000 fine; Texas allows $2000; Oregon allows $2500; Alaska, Indiana, and Pennsylvania allow $5000; Rhode Island and North Dakota place no limit on amount of fine). Courts no longer use the $500 fine test that *Baldwin* appeared to set for determining whether the right to a jury trial exists. *See* Baldwin v. New York, 399 U.S. 66, 71 (1970). In fact, the Supreme Court has stated that "[n]o talismanic significance" is to be accorded the $500 monetary fine limit on petty offenses. Muniz v. Hoffman, 422 U.S. 454, 477 (1976). "It is one thing to hold that deprivation of an individual's liberty beyond a six month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than $500 is contemplated." *Id.* (finding no right to jury trial for 13,000-member union assessed $10,000 fine).

Other financial penalties the state imposes can include court costs, a license reinstatement fee, mandatory tuition at treatment programs, and a legislatively imposed insurance premium. *See Landry I*, 818 F.2d at 1177; *Craner*, 652 F.2d at 26; State v. Zoppi, 196 N.J. Super. 596, 599, 601-02, 483 A.2d 844, 845-46 (N.J. Super. Ct. Law Div. 1984).

120. *See* Appendix, *infra* (in 46 states substance-abuse or educational program is possible sanction); *see also* BUSINESS & TRANSP. AGENCY, CALIFORNIA DEP'T OF MOTOR VEHICLES, & HEALTH & WELFARE AGENCY, CALIFORNIA DEP'T OF ALCOHOL & DRUG ABUSE, AN EVALUATION OF ALCOHOL ABUSE

the performance of several days of community service.[121] Moreover, a majority of state statutes require courts to impose a mandatory minimum jail term and other mandatory penalties on the first-time DWI offender.[122] Many experts consider the penalties other than imprisonment to be the most substantial and effective punishments for drunk drivers.[123] Thus, an analysis that ignores or deemphasizes the potential consequences beyond imprisonment does not accurately reflect the seriousness of the offense. A more appropriate inquiry would analyze the severity of all the statutory penalties.[124]

TREATMENT AS AN ALTERNATIVE TO DRIVERS LICENSE SUSPENSION OR REVOCATION (1978) (studying 12-month treatment program for multiple-DWI offenders).

121. *See* Appendix, *infra* (19 states provide community service as possible penalty for first-time DWI offenders); *see also* REPORT, *supra* note 6, at 18, 22 (urging community service, rehabilitation, and treatment programs for drunk drivers).

122. *See* Appendix, *infra* (30 states have mandatory minimum jail term for first-time DWI offenders, including five days in Colorado; seven days in Nebraska; 10 days in Georgia, Louisiana, and Oklahoma; 60 days in Delaware); *see also* Daly & Kassekert, *supra* note 1, at 44 (39 states have mandatory jail term for second DWI offense). Because this mandatory punishment distinguishes DWI from most petty offenses, several courts recognize mandatory minimum jail terms as a significant statutory punishment. *See, e.g.*, Bronson v. Swinney, 648 F. Supp. 1094, 1098-99 (D. Nev. 1986) (holding mandatory jail term distinguishes DWI from petty offenses); State v. O'Brien, 68 Haw. 39, 45, 704 P.2d 883, 886-87 (1985) (recognizing that mandatory imprisonment can lead to severe economic and personal difficulties); Fisher v. State, 305 Md. 357, 367, 504 A.2d 626, 631 (1986) (holding that mandatory jail term for second offense is reason for granting jury trial); *see also* REPORT, *supra* note 6, at 18 (recommending mandatory 100-hour community service or 48-hour jail term for first-time DWI offender, 10-day mandatory jail term for second offense, and 120-day mandatory jail term for subsequent offenses); L. TAYLOR, *supra* note 115, § 1.5.3, at 68 (discussing severity of consequences for DWI, including mandatory jail term); Starr, *supra* note 5, at 35 (reporting 77% of Americans favor mandatory jail term for first-time DWI offenders).

In addition to the mandatory jail term, most states also provide other mandatory minimum penalties. *See* Appendix, *infra* (mandatory fines, license suspension, community service, and treatment programs); *see also* 1 ENCYCLOPEDIA OF ASSOCIATIONS, *supra* note 9, at 1080 (MADD encourages more stringent laws requiring mandatory minimum punishment); REPORT, *supra* note 6, at 18 (urging mandatory fines, jail terms, and license suspensions).

123. Because the drunk driver is not necessarily someone the public and state wish to imprison for a long period of time, courts often impose other statutory penalties. *See, e.g.*, 1 R. ERWIN, *supra* note 11, § 2B.01, at 2B-1 ("The possible penalties facing the individual convicted of drunk driving are among the most disparate in kind and the most susceptible to enhancement by legislative fiat of those for any penal offense"); H. KALVEN & H. ZEISEL, *supra* note 11, at 309 (discussing severity of license suspension).

124. *See infra* notes 126-37 and accompanying text; *see also* Landry v. Hoepfner, 818 F.2d 1169, 1176-77 (5th Cir. 1987), *rev'd*, 840 F.2d 1201 (5th Cir.

A repeat DWI offender not only faces the same variety of statutory penalties as a first-time offender, but also faces the potential of an enhanced sentence.[125] Nearly every jurisdiction enhances the statutory penalties for a repeat DWI violation.[126] Conversely, states rarely enhance penalties for repeat crimes other than DWI,[127] thus distinguishing DWI from the vast majority of offenses, many of which are deemed petty.[128]

Enhanced penalties exceeding the *Baldwin* standard may raise due process problems in repeat offender cases when the courts have denied jury trials for the underlying offenses. The Supreme Court has held that the enhancement of statutory penalties violates the due process clause when the court did not provide the right to counsel for the underlying conviction.[129] A consistent rationale would prevent enhancement of DWI penalties beyond certain levels if the right to a jury trial had not been provided for the underlying offenses.

Statutory enhancement can be particularly onerous in some jurisdictions. Louisiana's DWI enhancement statute[130]

1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH) (finding consideration of all consequences that courts may impose is appropriate); *Bronson*, 648 F. Supp. at 1098 (stating court must look beyond maximum authorized imprisonment); United States v. Thomas, 574 F. Supp. 197, 198-99 (D.D.C. 1983) (holding that court must consider imprisonment and impairment of defendant's protest activity), *aff'd*, 753 F.2d 167 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 873 (1985); United States v. Woods, 450 F. Supp. 1335, 1346 n.12 (D. Md. 1978) (stating that court must consider all consequences); Brady v. Blair, 427 F. Supp. 5, 9 (S.D. Ohio 1976) (giving consideration to community opinion); Rothweiler v. Superior Court, 100 Ariz. 37, 44, 410 P.2d 479, 484 (1966) (en banc) (considering severity of total penalty).

125. In most states, the repeat DWI offense must occur within a certain number of years of the first offense. *See, e.g.*, CONN. GEN. STAT. § 14-227a(h) (1987) (repeat offense must occur within five years of first offense); NEV. REV. STAT. § 484.3792 (1987) (repeat offense must occur within seven years of first offense).

126. Forty-nine states (Oregon is the exception) provide for enhanced penalties for repeated DWI offenses. *See* 4 R. ERWIN, *supra* note 11, § 33A-App. (identifying increased penalties for each subsequent offense in each jurisdiction).

127. *See* 1 *id.* § 2B.01, at 2B.1 (noting enhancement is more common for DWI than other offenses).

128. *See* Bronson v. Swinney, 648 F. Supp. 1094, 1099 (D. Nev. 1986) ("system of increasing penalties sets the offense of driving while intoxicated apart from most offenses").

129. *See* Baldasar v. Illinois, 446 U.S. 222, 222-24 (1980) (per curiam). In *Baldasar*, the Court held that prior uncounseled misdemeanor convictions may not be used to enhance the penalties for subsequent violations. *Id.* at 226; *see also* State v. Nordstrom, 331 N.W.2d 901, 904 (Minn. 1983) (holding prior uncounseled DWI conviction cannot be used for enhancement).

130. *See* LA. REV. STAT. ANN. §§ 14:98, 32:414 (West 1986 & Supp. 1988).

presents an egregious example. A jury trial right is not provided for the first two DWI offenses.[131] The third offense, however, is punishable by imprisonment for one to five years.[132] The maximum imprisonment for the fourth DWI offense is for thirty years, with a minimum sentence of ten years.[133] Thus, in Louisiana two prior convictions without a jury trial can provide the basis to imprison an individual for thirty years for drunk driving. Such a severe penalty raises serious due process problems and distinguishes the DWI defendant from defendants charged with petty offenses.

The variety of statutory punishments for DWI also often increases the length of time that a court or state exercises control over the DWI defendant. Several federal and state courts therefore distinguish DWI from the typical petty offense.[134] Moreover, because state legislatures consider a variety of statutory penalties to be the most effective punishment,[135] and because courts actually impose penalties other than imprisonment,[136] courts also should focus on such penalties when determining whether the right to a jury trial attaches.

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131. *See* City of Monroe v. Wilhite, 255 La. 838, 841, 233 So. 2d 535, 536, *cert. denied*, 400 U.S. 910 (1970); State v. Landry, 463 So. 2d 761, 764-65 (La. Ct. App. 1985), *rev'd*, Landry v. Hoepfner, 818 F.2d 1169 (5th Cir. 1987), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); LA. REV. STAT. ANN. §§ 14:98, 32:414 (West 1986 & Supp. 1988).

132. LA. REV. STAT. ANN. § 14:98 (West 1986).

133. *Id.*; *see also infra* note 189 and accompanying text (discussing harshness of other enhanced penalties); *cf.* Blanton v. North Las Vegas Mun. Court, 103 Nev. 623, 633, 748 P.2d 494, 501 (1987) (no right to jury trial for first DWI), *cert. granted*, 108 S. Ct. 2843 (1988); NEV. REV. STAT. §§ 484.379, 484.3792 (1987) (one to six years' imprisonment for third DWI offense).

134. *See supra* notes 118, 128 and accompanying text. Several courts have inquired into this wide variety of statutory penalties in determining whether DWI is a petty or serious offense. *See, e.g.*, Landry v. Hoepfner, 818 F.2d 1169, 1175-77 (5th Cir. 1987) (considering educational program, substance abuse program, and community service), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); United States v. Jenkins, 780 F.2d 472, 474-75 (4th Cir.) (considering mandatory assessment, community service, education programs, automatic license suspension, and possibility of increased insurance rates), *cert. denied*, 476 U.S. 1161 (1986); United States v. Craner, 652 F.2d 23, 26 (9th Cir. 1981) (finding possible license revocation indicates DWI is serious offense); Bronson v. Swinney, 648 F. Supp. 1094, 1099-1100 (D. Nev. 1986) (considering mandatory imprisonment, license revocation, and enhanced penalties); State v. O'Brien, 68 Haw. 39, 44, 704 P.2d 883, 887 (1985) ("mix of punishments which apply once a driver has been found guilty of drunk driving reflects the opprobrium with which the people of this state view such activity").

135. *See supra* note 123 and accompanying text.

136. *See, e.g.*, Little, *Administration of Justice in Drunk Driving Cases*, 58 A.B.A. J. 950, 952 (1972) (reporting Vermont study indicating 96% of DWI of-

Although recent Supreme Court cases emphasize the importance of the potential term of imprisonment in determining the right to a jury trial, the other statutory penalties for DWI may be more severe.[137] Courts thus should consider all the potential statutory penalties to ensure the proper protection of the rights of DWI defendants.

B. THE COMMON-LAW TESTS

Before the Supreme Court established that the statutory penalties are the most relevant criteria for determining the right to a jury trial, federal and state courts primarily applied the common-law tests of the nature of the offense, whether the offense was considered malum in se, and whether the offense was indictable at common law.[138] These tests focus on the charged offense and, although never explicitly defined, are in widespread use in the lower courts.[139]

The nature of the offense and malum in se tests rely on the case-by-case judgment of a court to determine whether a particular offense is of a grave character or morally offensive.[140] Because the courts traditionally have regarded the violation of liquor statutes as involving moral turpitude[141] and because the public in general condemns drunk driving,[142] some courts have determined that DWI is a serious offense under the nature of the offense test.[143] At common law, voluntary intoxication[144]

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fenders served no jail time, despite two-year possible imprisonment, but noting that courts always imposed license suspension).

137. *See, e.g., Jenkins*, 780 F.2d at 474-75 (providing for only 30-day imprisonment but adding several other statutory penalties).

138. *See, e.g.*, District of Columbia v. Clawans, 300 U.S. 617, 625 (1937) (applying nature of the offense and indictable at common law tests); District of Columbia v. Colts, 282 U.S. 63, 73 (1930) (applying nature of the offense, indictable at common law, and malum in se tests); Schick v. United States, 195 U.S. 65, 68 (1904) (applying nature of the offense test); Callan v. Wilson, 127 U.S. 540, 555-57 (1888) (applying nature of the offense and indictable at common law tests).

139. *See supra* notes 37, 42, and 46.

140. *See supra* notes 37-45 and accompanying text. Because the Supreme Court has never specified what the characteristics of a morally offensive crime are, courts must make a case-by-case determination. Some courts have found public attitudes helpful in setting moral standards for the nature of the offense test. *See* United States v. Jenkins, 780 F.2d 472, 474 (4th Cir.), *cert. denied*, 476 U.S. 1161 (1986); *infra* note 172.

141. *See* Note, *supra* note 37, at 120.

142. *See supra* notes 9-10 and accompanying text.

143. *See, e.g.*, Rothweiler v. Superior Court, 100 Ariz. 37, 44, 410 P.2d 479, 485 (1966) (en banc) (noting that DWI is morally offensive to public); Fisher v. State, 305 Md. 357, 367, 504 A.2d 626, 631 (1986) (per curiam) (noting serious-

and nuisance on the highway[145] were malum in se offenses.[146] Because of the similarity of DWI to these offenses, the destructive nature of DWI,[147] and the community's low opinion of DWI defendants,[148] several courts also have ruled that DWI is malum in se.[149] Although the malum in se test retains vitality in the lower courts,[150] the Supreme Court has not used the test since 1930.[151] Additionally, whether DWI involves moral turpitude is open to debate.[152]

DWI was not indictable at common law when the United States Constitution was adopted.[153] The common law, however,

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ness of DWI is shown by terrible consequences and public attitudes); State v. Hoben, 256 Minn. 436, 441, 98 N.W.2d 813, 817 (1959) (stating that DWI is of serious nature).

144. *See* Note, *supra* note 42, at 81.

145. *See* District of Columbia v. Colts, 282 U.S. 63, 73 (1930) (reckless driving "is not merely *malum prohibitum* but in its very nature is *malum in se*"). The Ninth Circuit, in examining the seriousness of DWI, stated that "[t]here is no legally meaningful distinction between the present case and *Colts*." United States v. Craner, 652 F.2d 23, 26 (9th Cir. 1981).

146. *See supra* notes 40-42 and accompanying text.

147. *See supra* notes 1-6 and accompanying text. Because of the significant risk of death, injury, and highly destructive results, courts should regard DWI as an innately reprehensible act according to the *Landry I* court. *See* Landry v. Hoepfner, 818 F.2d 1169, 1176 (5th Cir. 1987), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH).

148. *See supra* note 10; *infra* note 173.

149. Because operating a motor vehicle while intoxicated is extremely dangerous, *see supra* notes 1-6 and accompanying text, whether it is prohibited by law or not, *see supra* notes 40-42 and accompanying text, some courts have regarded DWI as malum in se. *See, e.g., Landry I*, 818 F.2d at 1176 (holding DWI "is truly *malum in se*"); Bronson v. Swinney, 648 F. Supp. 1094, 1099 (D. Nev. 1986) (not hesitating to classify DWI as malum in se); United States v. Woods, 450 F. Supp. 1335, 1348 (D. Md. 1978) (same); United States v. Barner, 195 F. Supp. 103, 108 (N.D. Cal. 1961) (stating drunk driver "is guilty of an innately reprehensible act, which every reasonable person would decry"); Parham v. Municipal Court, 86 S.D. 531, 538, 199 N.W.2d 501, 505 (1972) (holding DWI must be considered malum in se); Keller v. State, 155 Tenn. 633, 636-37, 299 S.W. 803, 804 (1927) (DWI is malum in se).

150. *See supra* note 42.

151. A LEXIS search suggests that District of Columbia v. Colts, 282 U.S. 63 (1930), is the only right to jury trial case in which a Supreme Court majority has used this test (LEXIS search terms: "mal! prohibit!" or "mal! in se" w/50 "jury trial," LEXIS, Genfed library, U.S. file).

152. *See* Whirley v. State, 450 So. 2d 836, 838 (Fla. 1984) (per curiam) (holding that DWI is apparently malum prohibitum and not morally offensive); Compton v. Jay, 389 S.W.2d 639, 642 (Tex. 1965) (holding DWI does not involve moral turpitude).

153. Because no motor vehicles existed at the time of the adoption of the United States Constitution, DWI could not have existed as an indictable offense. *See Colts*, 282 U.S. at 73; Landry v. Hoepfner, 840 F.2d 1201, 1205 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-

did deem the operation while intoxicated of a vehicle such as a carriage to be an indictable offense.[154] In *Colts*,[155] the Supreme Court found reckless driving to be sufficiently similar to reckless driving of carriages and nuisance on the highway[156] to invoke the right to trial by jury.[157] As a result, some lower courts have inquired whether related offenses were indictable at common law.[158] Because of the highly destructive nature of the modern motor vehicle,[159] common-law crimes such as public drunkenness are not closely analogous to drunk driving,[160] but some federal and state courts have found substantial similarities between DWI and reckless driving or nuisance on the highway.[161] These courts therefore afford the DWI defendant the

CFH); United States v. Woods, 450 F. Supp. 1335, 1342-45 (D. Md. 1978); Rothweiler v. Superior Court, 100 Ariz. 37, 43, 410 P.2d 479, 486 (1966) (en banc); Whirley v. State, 450 So. 2d 836, 838 (Fla. 1984) (per curiam); Fisher v. State, 305 Md. 357, 365, 504 A.2d 626, 630 (1986) (per curiam); State v. Morrill, 123 N.H. 707, 712, 465 A.2d 882, 885 (1983); State v. Rodgers, 91 N.J.L. 212, 212, 102 A. 433, 434 (1917); Frankfurter & Corcoran, *supra* note 13, at 928 (noting that liquor and highway-related violations were tried without jury at common law).

154. *See Colts*, 282 U.S. at 73.

155. District of Columbia v. Colts, 282 U.S. 63 (1930); *see supra* note 43 and accompanying text.

156. *Colts*, 282 U.S. at 73 (reckless driving "was an indictable offense at common law, . . . when horses, instead of gasoline constituted the motive power") (citation omitted). *But cf. supra* note 153 (cases finding DWI not an indictable offense). Nuisance on the highway was indictable at common law. *See* State v. Rodgers, 91 N.J.L. 212, 212, 102 A. 433, 433 (1917); Note, *supra* note 142, at 75. Nevertheless, other courts have questioned whether reckless driving and nuisance on the highway were in fact indictable at common law. *See* United States v. Craner, 652 F.2d 23, 26 n.3 (9th Cir. 1981); *supra* note 153.

157. *See Colts*, 282 U.S. at 73.

158. *See* Rothweiler v. Superior Court, 100 Ariz. 37, 42, 47, 410 P.2d 479, 483, 486 (1966) (en banc) (looking for offenses similar to DWI); State v. Superior Court, 121 Ariz. 174, 176, 589 P.2d 48, 50 (Ariz. Ct. App. 1978) (holding that shoplifting is sufficiently related to common-law crime of larceny to warrant jury trial); State v. O'Brien, 68 Haw. 39, 42, 704 P.2d 883, 886 (1985) (finding DWI akin to reckless driving, which was indictable at common law). *But see* United States v. Woods, 450 F. Supp. 1333, 1345 (D. Md. 1978) (rejecting related-offense argument for DWI).

159. *See supra* notes 1-6 and accompanying text; *see also* United States v. Woods, 450 F. Supp. 1335, 1345 (D. Md. 1978); State v. O'Brien, 68 Haw. 39, 43, 704 P.2d 883, 886 (1985) ("The destructive capacity of the modern automobile would make attempted analogies to intoxication offenses involving vehicles at the time of adoption of the United States Constitution inapt.").

160. *See O'Brien*, 68 Haw. at 43, 704 P.2d at 886; *see also* Frankfurter & Corcoran, *supra* note 13, at 982 (arguing that courts must give past history present application).

161. *See supra* note 156.

right to a jury trial under the indictable at common law test.[162]

These three common-law tests, however, are imprecise and focus only on the offense charged, failing to take into account punishment or other objective factors.[163] The Supreme Court has deemphasized these tests in relation to the statutory penalty and has not used them to find a right to a jury trial for more than fifty years.[164] Moreover, whether a particular offense was indictable or morally offensive two hundred years ago has little bearing on its current seriousness.[165] Therefore, even though the common-law tests can be used to indicate DWI's seriousness, they fail to consider adequately either the gravity with which the general public regards the offense or, more importantly, the seriousness of the statutory penalties.[166]

C. THE COLLATERAL CONSEQUENCES

Although the Supreme Court has never used the collateral consequences[167] test, several Justices have stated that courts should examine such consequences when determining whether the right to a jury trial exists.[168] Collateral consequences that

162. *See O'Brien*, 68 Haw. at 42-43, 704 P.2d at 886. *But see* Landry v. Hoepfner, 818 F.2d 1169, 1177 (5th Cir. 1987) (holding DWI not indictable), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); United States v. Craner, 652 F.2d 23, 26 n.3 (9th Cir. 1981) (same); Rothweiler v. Superior Court, 100 Ariz. 37, 42, 410 P.2d 479, 483 (1966) (en banc) (same); *supra* note 153 (related cases).

163. *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 68 (1970) (seeking objective criteria); Frank v. United States, 395 U.S. 147, 148 (1969) ("In determining whether a particular offense can be classified as 'petty,' this Court has sought objective indications of the seriousness with which society regards the offense."); Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (stressing need to refer to objective criteria); District of Columbia v. Clawans, 300 U.S. 617, 628 (1939) (declaring need for objective standards).

164. *Colts*, in 1930, was the last Supreme Court case in which the Court found a right to a jury trial based upon the common-law tests. District of Columbia v. Colts, 282 U.S. 63 (1930).

165. *Cf. Clawans*, 300 U.S. at 627 ("those standards of action and of policy which find expression in the common and statute law may vary from generation to generation"). In earlier right to trial by jury cases, the Supreme Court used one or more of the common-law tests, *see supra* notes 36-47 and accompanying text, but the Court has shifted the focus to statutory penalties in more recent cases, *see Baldwin*, 399 U.S. at 68-70; *Duncan*, 391 U.S. at 159-61; *supra* note 30.

166. *See supra* note 163 and accompanying text.

167. *See supra* note 26.

168. *See supra* note 49 and accompanying text. These Justices cite *Craner*, *Brady*, and *Woods* as leading examples of cases that considered a variety of factors and collateral consequences. *See* Welsh v. Wisconsin, 466 U.S. 740, 762-63 (1984) (White, J., dissenting).

can result from a DWI conviction include financial costs such as increased insurance premiums,[169] retesting for a new driver's license, the need to use alternative transportation, attorney's fees, tuition in treatment programs,[170] and loss of employment or wages.[171] Moreover, in recent years the public's disdain of drunk driving has increased dramatically,[172] largely because of the efforts of citizens' groups such as Mothers Against Drunk Driving.[173] Other social stigmas, such as that caused when a local newspaper prints the names of those convicted of DWI,[174] can also result from a DWI conviction. Several lower courts,

169. *See, e.g.*, Landry v. Hoepfner, 818 F.2d 1169, 1177 (5th Cir. 1987) (considering "serious economic repercussions, such as an increase in insurance premiums"), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH). *But see* State v. Zoppi, 196 N.J. Super. 596, 601-02, 483 A.2d 844, 845-47 (N.J. Super. Ct. Law Div. 1984) (holding that legislatively-mandated insurance surcharge was not significant).

170. *See* Bronson v. Swinney, 648 F. Supp. 1094, 1099 (D. Nev. 1986) (holding tuition for and attendance at substance abuse classes are significant collateral consequences).

171. *See* 1 R. ERWIN, *supra* note 11, § 2B.01, at 2B-1; *see also* Rubenstein, *supra* note 4, at 11 (reporting $5000 average cost in Minnesota for fines, attorney's fees, license reinstatement, and increased insurance cost).

172. *See supra* notes 9-10. The more than 50% increase in DWI arrests and the enactment of laws with more stringent penalties indicates changing public attitudes toward DWI. *See supra* notes 7-8.

Although the Supreme Court never formalized community attitudes as a criterion, the Court occasionally examines such attitudes toward an offense when determining whether it is petty or serious. *See* District of Columbia v. Clawans, 300 U.S. 617, 625 (1937). Considering community attitudes may be helpful in determining the right to a jury trial, but the Court traditionally considers community attitudes as part of either the nature of the offense test or as an indicator reflected by the statutory penalty. *See* Duncan v. Louisiana, 391 U.S. 145, 160 (1968); *Clawans*, 300 U.S. at 628 (examining "the laws and practices of the community taken as a gauge of its social and ethical judgments"); *supra* notes 37-39 and accompanying text.

173. The 600,000 members of MADD, the largest of these groups, include victims of drunk-driving accidents and other concerned citizens. The members engage in a wide variety of activities, including speaking to community and business groups and lobbying legislatures and courts in an effort to eradicate the drunk-driving problem. *See* 1 ENCYCLOPEDIA OF ASSOCIATIONS, *supra* note 9, at 1080; *see also* Jones v. Richards, 776 F.2d 1244, 1246 (4th Cir. 1985) (involvement of MADD was aid in prosecution); Brannigan v. Raybuck, 136 Ariz. 513, 519, 667 P.2d 213, 219 (1983) (MADD filed amicus brief); State v. McNaught, 238 Kan. 567, 577, 713 P.2d 457, 467 (1986) (MADD members attended DWI trial); *see generally* Starr, *supra* note 5, at 36-39 (discussion of MADD's activities).

174. *See* Bronson v. Swinney, 648 F. Supp. 1094, 1099-1100 (D. Nev. 1986) (noting that names of convicted drunk drivers are regularly published in newspapers); *see also* S.C. CODE ANN. § 56-5-3000 (Law. Co-op. Supp. 1987) (mandating publication by state of names of all who had their licenses suspended for DWI).

especially in DWI cases, have considered the collateral consequences related to a conviction[175] and, as a result, have held that DWI is not analogous to other petty offenses.[176]

Although collateral consequences undoubtedly have a significant impact on many DWI defendants, courts should not consider them when determining whether the defendant may invoke the right to a jury trial.[177] Because collateral consequences are not state-imposed statutory penalties, granting the right to a jury trial will not protect a defendant from these consequences. Moreover, collateral consequences exist to some extent for virtually all criminal offenses. For example, insurance costs can increase for any driving violation.[178] In addition, although some other offenses carry as much public opprobrium as a DWI conviction, social stigma is not considered relevant in the determination of the right to jury trial for those offenses.[179] Furthermore, collateral consequences are speculative in nature,

175. *See, e.g.*, Brady v. Blair, 427 F. Supp. 5, 10 (S.D. Ohio 1976) (noting that DWI conviction may have substantial impact on defendant's financial resources, travel, and occupation, as well as liberty); State v. O'Brien, 68 Haw. 39, 44, 704 P.2d 883, 887 (1985) (holding that collateral punishments were not minor); Parham v. Municipal Court, 86 S.D. 531, 537, 199 N.W.2d 501, 504 (1972) (holding it proper to consider collateral consequences); *see also supra* note 50 and accompanying text.

176. *See, e.g.*, Landry v. Hoepfner, 818 F.2d 1169, 1176 (5th Cir. 1987) (drunk driving presents devastating social problem), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); *Brady*, 427 F. Supp. at 10 (holding consequences make DWI serious offense); Rothweiler v. Superior Court, 100 Ariz. 37, 44, 410 P.2d 479, 485 (1966) (en banc) (noting DWI is repugnant to community); *O'Brien*, 68 Haw. at 44, 704 P.2d at 887 (noting drunk driving is viewed with opprobrium).

Some courts that examine collateral consequences have grouped them with the statutory penalties without acknowledging that they were considering penalties beyond the statutory provisions. *See Landry I*, 818 F.2d at 1175; United States v. Craner, 652 F.2d 23, 27 (9th Cir. 1981); *supra* note 26.

177. *See* Baldwin v. New York, 399 U.S. 66, 69 (1970) (discouraging consideration of collateral consequences). Although collateral consequences are not especially helpful in analyzing whether a charge of DWI gives rise to a right to trial by jury, this criterion may be more helpful in other circumstances, such as when competing federal constitutional interests exist. *See* United States v. Thomas, 574 F. Supp. 197, 198-99 (D.D.C. 1983) (finding infringement of first amendment rights), *aff'd*, 753 F.2d 167 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 873 (1985).

178. *See* Landry v. Hoepfner, 840 F.2d 1201, 1216 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH).

179. *See Landry II*, 840 F.2d at 1216 (noting that economic repercussions and public opprobrium are also common for crimes other than DWI). Of the recent non-DWI cases finding a right to a jury trial when the imprisonment did not exceed six months, *see supra* note 34, only one dealt with collateral consequences, *see Thomas*, 574 F. Supp. at 199.

because courts cannot determine with any consistency when and if they will occur, especially in the context of society's continually shifting moral values.[180] Conversely, statutory penalties are objective and apply to all offenders and thus are a better gauge of community opinion.[181] Finally, because of the great diversity in community and judicial attitudes,[182] and because of the speculative nature of collateral costs, courts cannot rely on collateral consequences in establishing uniform standards for determining the right to trial by jury for DWI defendants.

IV. A PROPOSED METHOD FOR DETERMINING WHETHER A DWI DEFENDANT HAS THE RIGHT TO A JURY TRIAL

Because DWI is not sufficiently analogous to common-law crimes, and because there can be a wide variation in collateral consequences and public and judicial attitudes, consideration of nonstatutory criteria interferes with a focused and objective application of the statutory penalties criteria. Courts should focus on the full range of potential statutory penalties to determine whether the right to a jury trial exists.[183] By examining together all the potential statutory penalties for DWI, especially imprisonment, penalty enhancement for repeat offenders, license revocation, and mandatory minimum jail terms, courts could develop objective guidelines that would accurately reflect the seriousness of the DWI penalty.[184]

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180. *See Landry II*, 840 F.2d at 1209-10 (stating that public view of offense is subjective and imprecise). Allowing public attitudes and the courts' moral judgments to influence the decision creates an undesirable inconsistency, because what one court or community considers a serious offense may be a petty offense in the next town. Conversely, a statutory penalty analysis will keep criteria consistent within each jurisdiction. *See* District of Columbia v. Clawans, 300 U.S. 617, 626-27 (1937) (noting that seriousness of penalties varies by generation); *cf. supra* note 88 (citing conflicting cases).

181. *See supra* notes 30, 163 (discussing statutory penalty as most important and objective factor); *see also* Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (discussing importance of statutory penalty as objective criterion).

182. *See Landry II*, 840 F.2d at 1209-10.

183. In *Duncan*, the Supreme Court implied that the proper approach is to focus on all of the statutory punishments. *Duncan*, 391 U.S. at 161 ("In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled . . . to refer to objective criteria, chiefly the existing laws and practices in the Nation."). Two of the best examinations of the variety of statutory penalties imposed upon the DWI defendant are Bronson v. Swinney, 648 F. Supp. 1094 (D. Nev. 1986) and State v. O'Brien, 68 Haw. 39, 704 P.2d 883 (1985).

184. *See supra* note 163.

When possible imprisonment does not exceed six months and thus does not fall within the *Baldwin* test,[185] courts should examine closely all the statutory penalties. For instance, if the statute provides for both a mandatory jail term and mandatory license revocation, courts should find the right to a jury trial.[186] If possible license revocation, enrollment in a treatment program, community service, or other restriction on the defendant's freedom extends beyond six months, the defendant also should have a constitutional right to a jury trial.[187] When the possible term of imprisonment is short, but a conviction carries other significant penalties, such as a fine exceeding $1000,[188] courts should find that defendants have the right to a jury trial. When the enhanced penalties for repeat offenses exceed any of these guidelines, or the *Baldwin* standard, courts either should find the right to a jury trial for the underlying offense or should refuse to consider the prior conviction in imposing penalties for subsequent convictions.[189]

In cases where the DWI statute provides for multiple and

185. *See supra* note 32 and accompanying text.

186. When jail time is mandatory, the right to counsel must be invoked. *See* Scott v. Illinois, 440 U.S. 367, 373-74 (1979); *supra* note 122 (discussing mandatory penalties for DWI); *supra* notes 115, 119 (discussing states with revocations for more than six months or fines exceeding $1000); Appendix, *infra* (mandatory jail terms).

187. An imprisonment penalty greater than six months invokes the right to a jury trial, as should other restrictions on the defendant's freedom that exceed six months.

188. Although the Supreme Court apparently has abandoned *Baldwin*'s bright-line test that considers fines over $500, *see supra* note 119, some line should be maintained for fines imposed on individuals, *see* United States v. Hamdan, 552 F.2d 276, 280 (9th Cir. 1977) (per curiam) (fine exceeding $500 for individuals invokes jury trial right); *see also* Appendix, *infra* (only five states have fines for DWI that exceed $1000).

189. *See supra* notes 125-33 and accompanying text; *see also* State v. Linnehan, 197 N.J. Super. 41, 43-44, 484 A.2d 34, 35 (N.J. Super. Ct. App. Div. 1984) (holding that enhancement to ten-year license revocation was insufficient to require right to jury trial). The enhanced penalties in many jurisdictions can become quite serious. For instance, permanent license revocation is possible in some states. *See* 4 R. ERWIN, *supra* note 11, § 33A-App-2. In addition, license revocation for at least three years is possible in several others. *Id.* Fines for repeat offenses also increase to $2500 in Alabama and $5000 in Tennessee. *Id.* Finally, the term of imprisonment greatly increases, subjecting repeat DWI offenders to one to six years in Arkansas, a 120-day mandatory minimum in California, one to five years in Idaho, a five-year maximum in Missouri, one to six years in Nevada, a one-year minimum in Pennsylvania, and a two-year minimum in South Dakota. *Id.* Thus, if the right to a jury trial does not exist with the first DWI offense and enhanced imprisonment does not exceed six months, other substantial enhanced penalties may activate the jury trial right.

enhanced penalties, none of which alone exceeds the suggested limits, courts should consider the cumulative effect of the penalties.[190] As the possible imprisonment approaches the *Baldwin* six-month standard,[191] only a few additional statutory penalties should be necessary to trigger the right to trial by jury. For example, a DWI statute that imposes a six-month imprisonment and a fine, combined with license revocation or any other statutory penalty, should result in the defendant having the right to a jury trial.

A. RESPONSE TO POSSIBLE PROBLEMS WITH THE PROPOSAL

The proposed method of analysis would extend the federal constitutional right to a jury trial to more DWI defendants. Given the large number of drunk-driving arrests, the proposal potentially could create significant administrative problems.[192] Many jurisdictions, however, already grant the right to a jury trial to all DWI defendants[193] and have not withdrawn the right because of backlog, costs, or other administrative problems.[194] Because many DWI defendants plead guilty[195] or waive their right to a jury trial,[196] administrative problems are not especially prohibitive. Furthermore, administrative expediency is not a compelling governmental interest that overrides

190. Courts should consider the cumulative weight of all the state-imposed statutory penalties, emphasizing imprisonment, license revocation, and mandatory penalties, rather than simply considering whether each penalty individually activates the right to a jury trial.

191. *See supra* note 32; *infra* notes 203-04 and accompanying text.

192. *See supra* note 4 (noting 1.8 million DWI arrests in a given year).

193. *See supra* note 20; *see also* Landry v. Hoepfner, 840 F.2d 1201, 1217-19 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH). One feared response to the administrative problems is that state legislatures may consider reducing the statutory punishments to prevent courts from granting a jury trial right to all DWI defendants. *See infra* notes 194-97 and accompanying text.

194. *See* Duncan v. Louisiana, 391 U.S. 145, 154 (1968); *cf.* Argersinger v. Hamlin, 407 U.S. 25, 38-39 n.9 (1972) (noting New York City study that indicated only two percent of serious traffic offenders were jailed).

195. *See* H. KALVEN & H. ZEISEL, *supra* note 11, at 18, 25 (reporting 75% guilty pleas, 10% bench trials, and 15% jury trials for major crimes); Starr, *supra* note 5, at 35 (reporting that California permitted 80,000 defendants charged with DWI to plead guilty to reckless driving in 1978).

196. *See* Baldwin v. New York, 399 U.S. 66, 74 & n.22 (1970); United States v. Craner, 652 F.2d 23, 27 (9th Cir. 1981); H. KALVEN & H. ZEISEL, *supra* note 11, at 18 n.12, 25 (noting that 99% of California traffic violations are disposed of before trial); Little, *supra* note 136, at 951 (reporting Vermont study indicating that only two percent of DWI cases went to jury trials).

constitutionally guaranteed individual rights.[197] Consequently, concerns about backlogging the courts with DWI defendants demanding a jury trial cannot justify the denial of this constitutional right.

Consideration of all the potential statutory penalties, but not the collateral consequences, would avoid the problem of courts considering penalties that legislatures did not enact. Moreover, such analysis would not affect legislative bodies, which would remain free to set any penalties they deem necessary.[198] If a lenient sentence results because a legislature chooses to limit the severity of the combined statutory punishments, no right to a jury trial should attach.[199] When the legislature imposes a wide variety of significant statutory penalties, however, courts should recognize the right to trial by jury.[200]

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197. *See, e.g.*, Baker v. City of Fairbanks, 471 P.2d 386, 394 & n.13 (Alaska 1970) (stating that constitutional rights should not take secondary position to expediency); Rothweiler v. Superior Court, 100 Ariz. 37, 44, 410 P.2d 479, 484 (1966) (en banc) (stating that expediency should not prevent right to trial by jury for DWI defendants); City of Canon City v. Merris, 137 Colo. 169, 173-74, 323 P.2d 614, 616-17 (1958) (stating that individual dignity and rights are trammeled by resort to expediency); *see also* Schick v. United States, 195 U.S. 65, 99 (1904) (Harlan, J., dissenting) (stating that convenience should not stand in the way of the right to trial by jury); *cf.* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (stating that court system is designed to assure fair trials before impartial tribunals, not efficiency). Although highway safety is a legitimate state interest, *cf.* South Dakota v. Neville, 459 U.S. 553, 563 (1982) (finding legitimate state interest in assigning penalties for refusal to take blood-alcohol test), and increased enforcement and convictions may increase the overall deterrent effect, *see* Comment, *Constitutional Issues Raised by the Civil-Criminal Dichotomy of the Maine OUI Law*, 35 ME. L. REV. 385, 395 n.35, 399-400, 403 (1983), a higher conviction rate, achieved more quickly, certainly would not rise to the level of a compelling state interest.

198. *See supra* notes 11, 20. Other considerations, such as the eighth amendment's prohibition of cruel and unusual punishment, would prevent outrageous penalties such as life imprisonment for DWI offenders. Legislatures also should not circumvent the right to a jury trial by imposing multiple penalties below the threshold level. *See supra* notes 190-91 and accompanying text.

199. *See* United States v. Sain, 795 F.2d 888, 890 (10th Cir. 1986) ($300 fine is only statutory penalty); *infra* notes 201-02 and accompanying text.

200. *See supra* notes 185-91 and accompanying text. Prior to Duncan v. Louisiana, 391 U.S. 145, 160 (1968), there was no Supreme Court case finding the right to a jury trial based upon the authorized statutory penalty. *Duncan* and *Baldwin*, however, have changed the focus of the Court's inquiry to statutory penalties. *See Baldwin*, 399 U.S. at 71; *Duncan*, 391 U.S. at 159-61. Nonetheless, the Supreme Court and lower courts recognize that some offenses are serious even though possible imprisonment does not exceed six months. *See supra* notes 14, 34, and 88.

B. APPLICATION OF THE PROPOSED METHOD OF ANALYSIS

Applying this proposed test still would not allow all DWI defendants to have a jury trial. In *Sain*, for example, when the maximum penalty was a fine of only $300,[201] the court correctly denied the defendant the right to a jury trial.[202]

In other jurisdictions, the possible penalties are so severe that the right to a jury trial is unquestionable. In addition to the twenty-two states that have imprisonment penalties that exceed the *Baldwin* standard,[203] fifteen states impose a possible six-month imprisonment and additional penalties.[204] In Louisiana, for example, the DWI defendant faces numerous significant statutory penalties, including license revocation, a fine, community service, a substance-abuse program, a mandatory minimum penalty, a possible six-month imprisonment,[205] and the potential for substantial enhanced penalties.[206] Therefore, the cumulative weight of the statutory penalties supports the Fifth Circuit's holding in *Landry I*, not *Landry II*.[207]

Between these two extremes, several jurisdictions have statutes that present courts with more difficult analyses.[208] The facts of the *Craner* and *Jenkins* cases presented the question of which statutory penalties are the most important—im-

201. The *Sain* Court did, however, rely exclusively on criminal contempt cases and the federal statutory definition of petty offenses, thus abdicating the jury trial right determination to the legislature and completely ignoring the relevant case law as an additional basis for finding an offense to be serious. *Sain*, 795 F.2d at 891; *see supra* notes 75-80; 103-12 and accompanying text.

202. The Oklahoma statute, which imposed only a $300 fine, was unusually lenient. See Appendix, *infra*, for a survey of state penalties. *See also* Welsh v. Wisconsin, 466 U.S. 740, 755 (1984) (Blackmun, J., concurring) (condemning Wisconsin's DWI statute, which provided only a $300 fine).

203. *See* Appendix, *infra*.

204. *See id.*

205. LA. REV. STAT. ANN. §§ 14:98, 32:414 (West 1986 & Supp. 1988).

206. *See supra* notes 125-33 and accompanying text.

207. *See supra* notes 79-87 and accompanying text. Because the *Landry I* court considered the full spectrum of statutory penalties, which are especially harsh in Louisiana, *see* text accompanying notes 205-06, *supra*, its decision more accurately reflects the seriousness of the statutory penalty than does the *Landry II* opinion, which looked only at whether the offense was indictable at common law and at the maximum possible imprisonment. Landry v. Hoepfner, 818 F.2d 1169, 1175-77 (5th Cir. 1987), *rev'd*, 840 F.2d 1201 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH); Landry v. Hoepfner, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *petition for cert. filed* (U.S. June 13, 1988) (No. 88-5043-CFH).

208. The task of line-drawing in the right to jury trial context "requires attaching different consequences to events which, when they lie near the line, actually differ very little." Duncan v. Louisiana, 391 U.S. 145, 161 (1968).

prisonment, license revocation, enhancement, fines, or some combination of these and other penalties. Although for most offenses imprisonment is the primary punishment, in DWI cases the statutory penalties other than imprisonment often are the more significant punishment.[209] Thus, as in *Craner*, when a possible six-month license revocation is added to a possible six-month imprisonment,[210] the combination should be enough to trigger the right to a jury trial. Similarly, with facts like those in *Jenkins*—a six-month license revocation combined with a possible thirty-day imprisonment, a fine, a mandatory minimum penalty, and community service[211]—courts also should recognize the right to a jury trial.

CONCLUSION

Federal and state courts are divided as to whether DWI is a petty or serious offense for purposes of determining the federal constitutional right to a jury trial. The Supreme Court and most lower courts have used several different criteria to determine whether a crime such as DWI is petty or serious. The common-law and collateral consequences criteria may indicate the seriousness of DWI, but these tests are not objective and therefore should not be determinative as to whether a DWI defendant has the right to a jury trial.

Some courts emphasize the statutory imprisonment penalty in determining whether the right to a jury trial exists. DWI, however, presents a situation in which statutory penalties other than imprisonment often impose the most significant punishment. Courts therefore should consider all of the statutory penalties and examine the cumulative effect of these penalties on the DWI defendant, emphasizing imprisonment, license revocation, enhancement, and mandatory minimum jail terms. Be-

209. *See supra* notes 113-37 and accompanying text.

210. United States v. Craner, 652 F.2d 23, 24 (9th Cir. 1981); *see supra* notes 59-65 and accompanying text.

211. United States v. Jenkins, 780 F.2d 472, 473-74 (4th Cir.), *cert. denied*, 476 U.S. 1161 (1986); *see supra* notes 66-74 and accompanying text. The *Jenkins* court considered various penalties under South Carolina's DWI statute, but failed to place much weight on this wide variety of penalties. *See Jenkins*, 780 F.2d at 474-75; *see also Landry II*, 840 F.2d at 1209 (looking only at statutory imprisonment penalty). Even though the *Jenkins* court correctly stated that the statutory penalty is the most important factor, the *Jenkins* court and the *Landry II* court did not believe license revocation, the possibility of enhancement, or community service should be significant factors in making the jury trial right determination. *See Landry II*, 840 F.2d at 1209; *Jenkins*, 780 F.2d at 474.

cause of the wide array of significant statutory penalties and possible due process problems, courts in most cases should classify DWI as a serious offense and therefore recognize the right to trial by jury in DWI cases.

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Appendix

Statutory Penalties for First-Time DWI Violations

State Statute	Maximum Imprisonment	Mandatory Jail Term	Fine	License Revocation or Suspension	Community Service[1]	Courses and Treatment Programs[1]
ALA. CODE § 32-5A-191 (Supp. 1988)	1 year[2]	—	$250-$1000[2]	90 days	—	referral program
ALASKA STAT. §§ 12.55.035, 12.55.135, 28.15.165, 28.15.166, 28.15.181, 28.35.030, 28.35.032 (1984 & Supp. 1987)	1 year	72 hours	$250-$5000	90 days minimum[3]	—	possible alcohol education or rehabilitation program
ARIZ. REV. STAT. ANN. §§ 13-707, 13-802, 28-448, 28-692 (1978 & Supp. 1987)	6 months	24 hours	$250-$1000	90 days-1 year	possible 8-24 hours	alcohol abuse classes or treatment
ARK. STAT. ANN. §§ 5-65-103, 5-65-104, 5-65-111, 5-65-112, 5-65-113, 5-65-114, 5-65-115 (1987)	1 year[4]	24 hours[4]	$150-$1000[4]	90-120 days[5]	possible public service[4]	alcohol education or treatment program
CAL. VEH. CODE §§ 13352, 23152, 23160, 23161, 23206 (West 1985 & Supp. 1988)	6 months[6]	96 hours[6]	$390-$1000[4]	6 months[6]	—	possible alcohol education program[6]

State Statute	Maximum Imprisonment	Mandatory Jail Term	Fine	License Revocation or Suspension	Community Service[1]	Courses and Treatment Programs[1]
COLO. REV. STAT. §§ 24-4.1-119, 42-2-122, 42-2-122.1, 42-2-123, 42-2-123.3, 42-2-124, 42-4-1202 (1984 & Supp. 1987)	1 year	5 days[7]	$300-$1000[8]	1 year minimum[9]	48-96 hours	possible treatment program[7]
CONN. GEN. STAT. § 14-227a (1987)	6 months[10]	48 hours[10]	$500-$1000	1 year[10]	100 hours[10]	possible alcohol education and treatment program
DEL. CODE ANN. tit. 21, §§ 2737, 2738, 4177, 4177A, 4177B, 4177C, 4177D, 4177E (1985)	6 months[11]	60 days[11]	$200-$1000[11]	1 year[12]	—	alcohol education or rehabilitation program or both[12]
D.C. CODE ANN. §§ 40-302, 40-437, 40-716 (1986)	90 days	—	$300 maximum	6 months[13]	—	—
FLA. STAT. §§ 316.193, 322.25, 322.26, 322.28, 322.282, 324.071, 324.072, 363.193(6) (1987)	6 months[14]	—	$250-$500[14]	180 days-1 year[15]	50 hours minimum[14]	substance abuse course and possible treatment
GA. CODE ANN. §§ 40-5-69, 40-5-70, 40-5-71, 40-5-72, 40-5-85, 40-6-391, 40-6-391.1 (1985 & Supp. 1988)	1 year[16]	10 days[16]	$300-$1000	1 year[17]	possible basic alcohol course[17]	

State Statute	Maximum Imprisonment	Mandatory Jail Term	Fine	License Revocation or Suspension	Community Service[1]	Courses and Treatment Programs[1]
HAW. REV. STAT. § 291-4 (1985 & Supp. 1987)	180 days[18]	48 hours[19]	$150-$1000[19]	90 days[20]	72 hours[19]	14-hour minimum alcohol rehabilitation program
IDAHO CODE §§ 18-8004, 18-8005 (1987 & Supp. 1988)	6 months	—	$1000 maximum	180 days maximum[21]	—	alcohol evaluation and possible alcohol treatment[22]
ILL. REV. STAT. ch. 38, paras. 1005-8-3, 1005-9-1; ch. 95 1/2, paras. 6-205, 6-206, 11-501 (1987)	1 year	—	$1000 maximum	1 year maximum[23]	—	alcohol evaluation
IND. CODE ANN. §§ 9-11-1-5, 9-11-2-1, 9-11-2-2, 9-11-3-1, 9-11-3-2, 35-50-3-2, 35-50-3-4 (Burns 1987 & Supp. 1988)	60 days or 1 year[24]	—	$500 or $5000 maximum[24]	90 days-2 years[25]		
IOWA CODE §§ 321J.2, 321J.3, 321J.4, 321J.17, 321J.20, 321J.22, 903.1, 907.3 (1986 & Supp. 1988)	1 year[26]	48 hours[26]	$500-$1000[26]	180 days[26]	200 hours maximum[26]	possible substance abuse evaluation or treatment
KAN. STAT. ANN. §§ 8-1005, 8-1008, 8-1567 (Supp. 1987)	6 months[27]	48 hours[27]	$200-$500[27]	1 year[28]	100 hours[27]	alcohol evaluation and possible education or treatment program or both[28]

State Statute	Maximum Imprisonment	Mandatory Jail Term	Fine	License Revocation or Suspension	Community Service[1]	Courses and Treatment Programs[1]
KY. REV. STAT. ANN. §§ 189.520, 189A.010, 189A.020, 189A.040, 189A.050, 189A.070 (Michie/Bobbs-Merrill Supp. 1988)	30 days[29]	48 hours[29]	$200-$500[29]	6 months[30]	2-30 days[29]	possible alcohol abuse or driver improvement program[30]
LA. REV. STAT. ANN. §§ 14:98, 32:414, 32:415.1 (West 1986 & Supp. 1988)	6 months	10 days[31]	$125-$500[32]	60 days[33]	32 hours[31]	possible substance abuse program[31]
ME. REV. STAT. ANN. tit. 17-A, §§ 1252, 1301; tit. 29, §§ 1312-B, 1312-D (1983 & Supp. 1988)	less than 1 year	48 hours[34]	$300-$1000	90 days[35]	—	possible alcohol education or treatment program[35]
MD. CTS. & JUD. PROC. CODE ANN. § 10-307 (1984); MD. TRANSP. CODE ANN. §§ 16-205, 16-208, 16-212, 21-902, 27-101 (1987)	1 year	—	$1000 maximum	6 month minimum[36]	—	possible alcohol education program
MASS. GEN. L. ch. 90, §§ 22, 24, 24D, 24E (1986)	2 years[37]	—	$100-$1000[37]	1 year[37]	—	alcohol screening and possible alcohol education or rehabilitation program[32]
MICH. COMP. LAWS ANN. § 257.625 (Supp. 1988)	90 days	—	$100-$500	6 months-2 years[38]	possible 12 days	possible alcohol education program

State Statute	Maximum Imprisonment	Mandatory Jail Term	Fine	License Revocation or Suspension	Community Service[1]	Courses and Treatment Programs[1]
MINN. STAT. §§ 169.121, 169.126, 171.29, 171.30, 609.03, 609.135 (1986 & Supp. 1987)	90 days[39]	—	$700 maximum[39]	30 day minimum[40]	—	alcohol problem screening and possible alcohol treatment[39]
MISS. CODE ANN. §§ 63-11-30,63-11-32, 63-11-37 (Supp. 1987)	1 day	—	$200-$500	90 days-1 year[41]	—	alcohol safety program[41]
MO. REV. STAT. §§ 302.302, 302.304, 302.505, 302.525, 302.540, 558.011, 560.016, 577.010, 577.012, 577.049, 577.520 (1986 & Supp. 1988)	6 months[42]	—	$500 maximum	30 days[43]	—	possible alcohol education or rehabilitation program[43]
MONT. CODE ANN. §§ 61-5-205, 61-5-208, 61-8-401, 61-8-406, 61-8-714, 61-8-722 (1987)	60 days[44]	24 hours	$100-$500	6 months	—	alcohol information course and possible treatment
NEB. REV. STAT. §§ 28-106, 39-669.07 (Supp. 1987, 1988)	30 days	7 days	$200-$500	60 days-6 months[45]	—	possible alcohol treatment
NEV. REV. STAT. §§ 484.379, 484.3791, 484.3792, 484.3794, 484.384, 484.385 (1987)	6 months[46]	2 days[46]	$200-$1000[47]	90 days	48 hours[46]	alcohol abuse course and possible treatment[46]

State Statute	Maximum Imprisonment	Mandatory Jail Term	Fine	License Revocation or Suspension	Community Service[1]	Courses and Treatment Programs[1]
N.H. REV. STAT. ANN. §§ 263:65, 263:65-a, 265:82, 265:82-b (1982 & Supp. 1987)	none	—	$1000 maximum	90 days-2 years	—	alcohol education program
N.J. STAT. ANN. §§ 39:4-50, 39:4-50.8 (West Supp. 1988)	30 days	12-48 hours	$250-$400[48]	6 months-1 year	—	screening and alcohol education program
N.M. STAT. ANN. §§ 66-8-102, 66-8-111 (Supp. 1988)	90 days[49]	30 days[49]	$300-$500[49]	90 days	—	possible alcohol treatment or rehabilitation or both
N.Y. VEH. & TRAF. LAW §§ 510, 1192 (McKinney 1986 & Supp. 1988)	1 year	—	$350-$500	90 days-1 year[50]	—	—
N.C. GEN. STAT. §§ 20-16.4, 20-17, 20-17.2, 20-19, 20-23.2, 20-138.1, 20-179, 20-179.2, 20-179.3 (1983 & Supp. 1987)	6 months[51]	72 hours[51]	$500 maximum	90 days-1 year[51]	72 hours minimum[51]	possible alcohol abuse treatment and education courses[51]
N.D. CENT. CODE § 39.06.1-10, §§ 39-08-01, 40-05-02, 40-18-12 (1983 & Supp. 1987)	none	—	$250 minimum	91 days[52]	—	addiction treatment program
OHIO REV. CODE ANN. §§ 2929.21, 4507.16, 4509.31, 4511.19, 4511.99 (Anderson 1982 & Supp. 1987)	6 months[53]	3 days[53]	$150-$1000	60 days-3 years[54]	—	possible driver intervention, treatment, or education program[53]

State Statute	Maximum Imprisonment	Mandatory Jail Term	Fine	License Revocation or Suspension	Community Service[1]	Courses and Treatment Programs[1]
OKLA. STAT. tit. 47, §§ 6-205, 6-212.1, 6-212.2, 11-902, 11-902.1, 11-902.2, 11-903.3, 754.1, 755 (Supp. 1987)	1 year[55]	10 days[55]	$1000 maximum[55]	30-90 days[56]	—	substance abuse course or treatment[55]
OR. REV. STAT. §§ 137.129, 161.615, 161.635, 813.010, 813.020, 813.030 (1987)	1 year[57]	48 hours	$2500 maximum[58]	—	80-250 hours[57]	alcohol problem[47] examination and possible treatment[57]
18 PA. CONS. STAT. §§ 1101, 1104 (1982 & Supp. 1987); 75 PA. CONS. STAT. §§ 1532, 1548, 3731 (1987)	2 years	48 hours	$300-$5000	12 months	—	alcohol evaluation and safety school
R.I. GEN. LAWS § 31-27-2 (Supp. 1987)	1 year[59]	—	$100 minimum	3-6 months	10-60 hours[59]	alcohol abuse course or treatment or both
S.C. CODE ANN. §§ 56-1-1320, 56-1-1330, 56-1-1350, 56-5-2930, 56-5-2940, 56-5-2990 (Law. Co-op. 1977 & Supp. 1987)	30 days	48 hours[60]	$200	6 months[61]	48 hours[60]	possible alcohol safety program[61]
S.D. CODIFIED LAWS ANN. §§ 22-6-2, 32-12-48, 32-12-52.1, 32-20A-21, 32-23-1, 32-23-2 (1986 & Supp. 1988)	1 year	—	$1000 maximum	30 days-1 year[62]	—	possible alcohol abuse program

State Statute	Maximum Imprisonment	Mandatory Jail Term	Fine	License Revocation or Suspension	Community Service[1]	Courses and Treatment Programs[1]
TENN. CODE ANN. §§ 53-7-501, 55-7-502, 55-10-401, 55-10-403, 55-10-412 (1980 & Supp. 1988)	11 months, 29 days[63]	48 hours	$250-$1000	1 year[64]	possible public service	possible alcohol safety program[63]
TEX. REV. CIV. STAT. ANN. arts. 6687b, 6701-11 (Vernon Supp. 1988)	2 years	72 hours	$100-$2000	90 days-1 year	—	—
UTAH CODE ANN. §§ 41-6-44, 41-2-127, 63-43-9, 63-43-10, 76-3-204, 76-3-301 (1986 & Supp. 1987)	6 months	48 hours[65]	$1000 maximum[66]	90 days[67]	24-50 hours[65]	alcohol education and rehabilitation program
VT. STAT. ANN. tit. 23, §§ 1201, 1206, 1209a, 1210 (1987 & Supp. 1988)	1 year	—	$200-$750	90 days[68]	—	alcohol and driving education program[68]
VA. CODE ANN. §§ 18.2-11, 18-2.266, 18.2-270, 18.2-271, 18.2-271.1, 46.1-417 (1988; Supp. 1988)	1 year	—	$1000 maximum	6 months[69]	possible alcohol safety, education, or treatment program[69]	
WASH. REV. CODE §§ 46.61.502, 46.61.504, 46.61.515 (1987 & Supp. 1988)	1 year	24 hours	$250-$1000	90 days or until age 19	—	alcohol information school and possible treatment program

State Statute	Maximum Imprisonment	Mandatory Jail Term	Fine	License Revocation or Suspension	Community Service[1]	Courses and Treatment Programs[1]
W. VA. CODE §§ 17C-5-2, 17C-5A-1, 17C-5A-2, 17C-5A-3 (1986 & Supp. 1988)	6 months	24 hours	$100-$500	6 months	—	possible educational and treatment programs
WIS. STAT. §§ 343.10, 343.30, 346.63, 346.65, 346.665 (1985-1986)	none	—	$150-$300[70]	6 months[71]	possible community service[70]	—
WYO. STAT. §§ 31-5-233, 31-7-128 (Supp. 1988)	6 months[72]	—	$750 maximum	90 days	—	possible alcohol education or treatment program[72]

[1] Unless otherwise noted, the community service and courses and treatment programs listed are mandatory.

[2] The court may impose imprisonment or a fine or both. ALA. CODE § 32-5A-191(c) (Supp. 1988).

[3] A limited license may be granted after 30 days upon a showing of economic hardship. ALASKA STAT. § 28.15.181(e)(3) (1984).

[4] Public service may be ordered in lieu of imprisonment or fine. ARK. STAT. ANN. §§ 5-65-111, 5-65-114 (1987). In addition, mandatory court costs of $250 are imposed. *Id.* § 5-65-115.

[5] A restricted license is available for employment-related purposes. *Id.* § 5-65-104(b)(1).

[6] In lieu of the listed penalties, the court may grant probation (three-year minimum), which would include mandatory participation in an alcohol education program, a fine ($390-$1000), possible imprisonment (48 hours-six months), and license restriction or suspension. CAL. VEH. CODE § 23161 (West Supp. 1988).

[7] The mandatory jail term may be suspended upon satisfactory completion of an alcohol program. COLO. REV. STAT. § 42-4-1202(4)(c)(II) (1984).

[8] Mandatory court costs of $25 are imposed. COLO. REV. STAT. § 24-4.1-119(1)(c) (Supp. 1987).

[9] There also is a mandatory license restoration fee of $50. COLO. REV. STAT. § 42-2-124 (1984).

[10] The court may order either imprisonment and fine or community service and license suspension. CONN. GEN. STAT. § 14-227a(h) (1987).

[11] The court may suspend the period of imprisonment, or grant probation in lieu of imprisonment and the fine. DEL. CODE ANN. tit. 21, §§ 4177(f), 4177B(a) (1985).

[12] If license revocation creates extreme hardship, a conditional license may be granted by the court. *Id.* § 4177E. A license reinstatement fee of $15 for suspended licenses and $125 for revoked licenses is required. *Id.* §§ 2737, 2738. In addition, a person on probation may apply for a conditional license after revocation if 16 hours of instruction or rehabilitation have been satisfactorily completed. *Id.* § 4177C(a). Any person who has satisfactorily completed a course of instruction or rehabilitation may reapply for a license six months after revocation. *Id.* § 4177C(b).

[13] The period of license revocation may be less than six months at the discretion of the Mayor or the Mayor's designated agent. D.C. CODE ANN. § 40-302(b) (1986). After a conviction for DWI, vehicle registration or license may also be suspended until proof of financial responsibility is shown. *Id.* § 40-437.

[14] Probation up to one year and a minimum of 50 hours community service are mandatory. FLA. STAT. § 316.193(6)(a) (1987). The court will impose an additional fine of $100 for this offense. Act of July 6, 1988, No. 88-381 § 60 (to be codified at FLA. STAT. § 363.193(6)).

[15] Proof of financial responsibility and a license reinstatement fee is required for restoration of license. FLA. STAT. § 324.072 (1987). In addition, the license may be temporarily restored if the defendant enrolls in and completes a driver improvement course. *Id.* § 322.25(7).

[16] The court may suspend, stay, or probate the period of imprisonment. GA. CODE ANN. § 40-6-391(c)(1)(B) (Supp. 1988).

[17] The driver's license may be reinstated after 120 days upon completion of an approved alcohol course and payment of a $25 restoration fee. GA. CODE ANN. § 40-5-70(b)(1)(A) (1985). The court may also require proof of insurance coverage and the retaking of driving tests prior to reinstatement. *Id.* § 40-5-

70(c)-(d). A limited driving permit may also be issued if suspension would create extreme hardship. *Id.* § 40-5-71.

[18] *See* State v. O'Brien, 68 Haw. 39, 44 n.5, 704 P.2d 883, 887 n.5 (1985).

[19] The court must sentence the defendant to one or more of the following: the minimum jail term, a fine, or community service. HAW. REV. STAT. § 291-4(b)(1)(C) (1985).

[20] In lieu of the 90-day suspension, the court may order a minimum suspension of 30 days, followed by a license restriction for the remainder of the 90-day period. *Id.* § 291-4(b)(1)(B).

[21] The court may allow restricted driving privileges on a defendant's showing of need. IDAHO CODE § 18-8005(1)(d) (Supp. 1988).

[22] If alcohol evaluation indicates need for treatment, the court will order treatment unless defendant proves it is not required. *Id.* § 18-8005(5).

[23] The court may allow a restricted license in hardship cases. ILL. REV. STAT. ch. 95 1/2, para. 6-206.1 (1987).

[24] The maximum prison term and fine depend on severity of the misdemeanor charged. IND. CODE ANN. §§ 33-50-3-2, 35-50-3-4 (Burns 1987).

[25] Depending on the DWI defendant's previous record and submission to a chemical test, the court may waive the license suspension and grant probationary driving privileges for 180 days. *Id.* § 9-11-3-1(b)(2).

[26] The court may order community service in lieu of the fine. IOWA CODE ANN. § 321J.2(2)(a) (Supp. 1988). In addition, the court can defer the DWI sentence and place the defendant on probation, but the license revocation cannot be reduced below 30 days. *Id.* §§ 321J.4, 907.3. A civil penalty of $100 is also imposed following license revocation. *Id.* § 321J.17. Moreover, the court has discretion to issue a restricted driver's license. *Id.* § 321J.20. The court may order the defendant to install ignition interlock devices on all motor vehicles operated by defendant. The devices prevent operation of the vehicles with an illegal blood alcohol concentration. Act Relating to Judicial Sentencing, § 1 (July 1, 1988) (to be codified at IOWA CODE § 321J.4(7)).

[27] The court may order either imprisonment or 100 hours of community service. KAN. STAT. ANN. § 8-1567(d) (Supp. 1987). The court may also order community service in lieu of a fine. *Id.* § 8-1567(h). An additional assessment of $110 may also be required. *Id.* § 8-1008(e).

[28] In lieu of the one-year license suspension, the court may order a suspension for a period of 21 days or until completion of a required treatment program. Thereafter, a limited license may be issued. *Id.* § 8-1567(d).

[29] The court must assess at least one of these penalties. KY. REV. STAT. ANN. § 189A.010(4) (Michie/Bobbs-Merrill Supp. 1988). A service fee of $150 is assessed in all convictions. *Id.* § 189A.050(1).

[30] The period of license suspension may be reduced to 30 days if the defendant successfully completes a driver improvement or an alcohol or treatment program. *Id.* § 189A.70(1)(a).

[31] The court must impose either the mandatory jail term or the community service and a substance-abuse program, or a two-day jail term and substance-abuse and driver-improvement programs. LA. REV. STAT. ANN. § 14:98(B) (West 1986).

[32] In certain parishes an additional fine of $25 is imposed. LA. REV. STAT. ANN. § 14:98(J) (West Supp. 1988).

[33] A $60 license reinstatement fee is mandatory. *Id.* § 32:414(G)(1)(b). A restricted license may be granted during period of suspension upon a showing of economic hardship. *Id.* § 32:415:1.

[34] A person will be imprisoned if the blood alcohol level was .15% or

more, and if he or she was either exceeding the speed limit by 30 miles or more, or attempted to elude an officer. ME. REV. STAT. ANN. tit. 29, § 1312-B(2)(B) (Supp. 1988).

[35] The Secretary of State may suspend licenses for an additional period of up to 135 days. *Id.* § 1312-D(1-A). Suspension may be reduced or limited licenses granted upon completion of an alcohol education or treatment program. *Id.* § 1312-D(2)-(3).

[36] The minimum revocation for driving while intoxicated is six months, while the maximum suspension for driving under the influence of alcohol is 60 days. MD. TRANSP. CODE ANN. §§ 16-205, 16-208(b) (1987).

[37] The court in its discretion may grant probation with mandatory treatment in lieu of these penalties. MASS. GEN. L. ch. 90, §§ 24(1), 24D, 24E (1986). The court may also order that the defendant only be imprisoned on weekends or evenings. *Id.* § 24(1)(a)(3).

[38] A restricted driver's license can be issued that permits the defendant to drive to and from work or other limited activities. MICH. COMP. LAWS ANN. § 257.625(4) (Supp. 1988). The court may also order the installation of ignition interlock devices on all vehicles operated by defendant. *Id.*

[39]The court may impose imprisonment or a fine or both. MINN. STAT. § 609.03(3) (Supp. 1987). A stay of execution may be granted for a maximum of two years if the defendant undergoes alcohol treatment. MINN. STAT. §§ 169.121(5), 609.135(2) (1986 & Supp. 1987).

[40] The court may grant a limited license. *Id.* § 171.30. Upon reinstatement of a revoked license, a $200 fee is assessed. MINN. STAT. § 171.29(2)(b) (Supp. 1987).

[41] The period of license suspension or revocation may be reduced to a minimum of 45 days in hardship cases, with a restricted license for the next 45 days or until the alcohol safety education program is completed. MISS. CODE ANN. § 63-11-37(2) (Supp. 1987).

[42] A suspended sentence with two years of probation may be imposed in lieu of imprisonment. MO. REV. STAT. § 577.010(2) (Supp. 1988).

[43] In addition, 60 days of restricted driving privileges are imposed following the suspension period. *Id.* §§ 302.304(4), 302.525(2). Furthermore, a $25 reinstatement fee and the completion of education programs are required before a driver's revoked license will be reinstated. *Id.* § 577.520.

[44] The maximum imprisonment for driving with excessive blood alcohol concentration (greater than .10%) is 10 days. MONT. CODE ANN. § 61-8-722(1) (1987).

[45] The minimum license suspension will apply if either probation or a suspended sentence is granted. NEB. REV. STAT. § 39-669.07 (Supp. 1987).

[46] The court may order either imprisonment or community service. NEV. REV. STAT. § 484.3792(1)(a) (1987). A one- to three-year period of treatment will postpone final sentencing. *Id.* § 484.3794(4). After successful treatment, the offender may not be sentenced to more than one day in jail or 24 hours of community service, or a $200 fine, or both. *Id.*

[47] In addition to any other penalty, the defendant must pay a $35 civil penalty. *Id.* § 484.3791.

[48] In addition, the court must impose a $100 surcharge. N.J. STAT. ANN. § 39:4-50.8 (West Supp. 1988).

[49] The court can impose imprisonment or a fine or both. N.M. STAT. ANN. § 66-8-102(D) (Supp. 1988). If the sentence is suspended, a 90-day to three-year period of probation must be imposed. *Id.*

[50] The statute does not specify the period of revocation for DWI, but for a lesser intoxicated-driving offense the revocation is for 90 days and for a repeat

DWI offense the minimum revocation is for one year. N.Y. VEH. & TRAF. LAW § 51υ (McKinney 1986 & Supp. 1988).

[51] The term of imprisonment can be suspended if the court imposes community service, license revocation, or probation. N.C. GEN. STAT. § 20-179(i) (Supp. 1987). The alcohol education program and community service alternatives require a $100 fee. *Id.* § 20-179.2(c). If alcohol education is not completed, a 12-month license revocation must be imposed. *Id.* § 20-16.4(b). Limited driving privileges can also be granted. *Id.* § 20-179.3.

[52] The state has a point system which determines the period of license suspension. N.D. CENT. CODE § 39-06.1-10 (Supp. 1987). A first-time DWI offense with no prior driving violations would result in a 91-day license suspension. *Id.*

[53] The court may suspend the term of imprisonment and place the offender on probation and require attendance at a driver intervention program. OHIO REV. CODE ANN. § 4511.99(A) (Anderson Supp. 1987).

[54] A restricted license is available upon a showing of necessity. *Id.* § 4507.16(D).

[55] The court can suspend the sentence upon the defendant's completion of the substance-abuse treatment course. OKLA. STAT. tit. 47, § 11-902.2 (Supp. 1987), *amended by* Act of June 24, 1988, No. 88-556.

[56] Act of June 24, 1988, No. 88-556 (to be codified at OKLA. STAT. tit. 47, § 6-205.1). The defendant must pay a license reinstatement fee of $150. OKLA. STAT. tit. 47, § 6-212.11(B) (Supp. 1987).

[57] The court must order either 48 hours' jail time or community service, in addition to a fine and an alcohol examination. OR. REV. STAT. § 813.020 (1987).

[58] A $175 court fee is also imposed. *Id.* § 813.030.

[59] The court must impose the imprisonment penalty or community service or both. R.I. GEN. LAWS § 31-27-2(d)(1) (Supp. 1987).

[60] Public service may be ordered in lieu of the mandatory jail term. S.C. CODE ANN. § 56-5-2940(1) (Law. Co-op. Supp. 1987).

[61] A provisional driver's license may be issued during the period of suspension, but proof of financial responsibility is required. *Id.* § 56-1-1320. The provisional driver's license option also includes a mandatory alcohol safety program. *Id.* § 56-1-1330.

[62] The defendant must pay a $50 license reinstatement fee. S.D. CODIFIED LAWS ANN. § 32-12-48 (Supp. 1988). The court may, in its discretion, issue an order permitting the defendant to operate a motor vehicle for purposes of the defendant's employment or attendance at court-ordered counseling programs. *Id.* § 32-23-2.

[63] If the sentence imposed is less than the maximum, the defendant must serve the duration of the maximum on probation. TENN. CODE ANN. § 55-10-403(c) (Supp. 1988). In addition, the defendant will be required to participate in an alcohol safety program. *Id.*

[64] The court has discretion to allow restricted use of the driver's license. *Id.* § 55-7-502(d).

[65] The court must impose either the mandatory jail time or the community service. UTAH CODE ANN. § 41-6-44 (Supp. 1987).

[66] An additional fee of up to $150 also may be imposed by the court. UTAH CODE ANN. § 63-43-10 (1986).

[67] The court may allow limited driving privileges. UTAH CODE ANN. § 41-2-127(4) (Supp. 1987).

[68] A $175 fee may be required for the alcohol and driving education pro-

gram with the license suspension continuing until the program has been completed. VT. STAT. ANN. tit. 23, § 1209a (1987).

[69] The court may issue a restricted license to a defendant who enters an alcohol education or treatment program. VA. CODE ANN. § 18.2-271.1 (1988). For the alcohol safety program the defendant must pay a fee of between $250 and $300. *Id.* § 18.2-271.1(B).

[70] In lieu of part or all of the fine, or in addition to the fine, the court may provide for community service. Act of July 31, 1988, No. 1987-27 § 2042m (to be codified at WIS. STAT. § 346.65(2g)). In addition to the fine the court will impose a $250 driver-improvement surcharge. Act of May 13, 1988, No. 1987-399 § 443m (to be codified at WIS. STAT. § 346.65(1)).

[71] After the first 15 days of the revocation period, the defendant is eligible for a restricted occupational license. WIS. STAT. § 343.30(1q)(b)(2) (1985-1986).

[72] The judge may suspend part or all of the imprisonment if the defendant agrees to pursue and completes an alcohol education or treatment program. WYO. STAT. § 31-5-233(d) (Supp. 1988).